No. 89-566

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF TREASURY,
FINANCIAL MANAGEMENT SERVICE, AND
FEDERAL LABOR RELATIONS AUTHORITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a federal agency, which is required by the Federal Service Labor-Management Relations Statute (5 U.S.C. 7114(b)(4)), to furnish the names and home addresses of bargaining unit employees to the union that is their exclusive representative, may nonetheless refuse to disclose that information on the basis of the Privacy Act (5 U.S.C. 552a).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Treasury Employees Union petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A) is unreported. The decision of the Federal Labor Relations Authority (Pet. App. B) is reported at 25 F.L.R.A. 560.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1989. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. ***Federal Service Labor-Management Relations Statute***

5 U.S.C. 7114(b)(4) provides:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—
>
> > (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
> >
> > > (A) which is normally maintained by the agency in the regular course of business;
> >
> > > (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
> >
> > > (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. . . .

2. ***Privacy Act***

5 U.S.C. 552a(b)(2) provides, in relevant part:

> (b) No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> > (2) required under section 552 of this title.

3. ***Freedom of Information Act***

5 U.S.C. 552(b)(6) provides, in relevant part:

> (b) This section does not apply to matters that are—
>
> > (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

STATEMENT

1. This case arises under the Federal Service Labor-Management Relations Statute (the Statute), which is Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101, *et seq.* The underlying dispute stems from an unfair labor practice charge petitioner, the National Treasury Employees Union (NTEU), filed against the Department of the Treasury, Financial Management Service (FMS). NTEU, a federal sector labor organization that is the exclusive representative of approximately 140,000 federal employees, represents all FMS non-professional General Schedule and Wage Grade employees in a nationwide consolidated bargaining unit. Pet. App. 37a.

The dispute between NTEU and FMS arose in 1986, when the union formally requested that the agency supply it with the names and home addresses of all FMS bargaining unit employees pursuant to 5 U.S.C. 7114 (b)(4). That provision establishes the duty of an agency "to furnish to the exclusive representative . . . upon request and, to the extent not prohibited by law, data . . . (B) which is reasonably available and necessary for full discussion, understanding, and negotiation of subjects within the scope of collective bargaining." The Union informed FMS that the purpose of its request for names and home addresses was to facilitate effective communication with FMS employees, including those who work in restricted or secured areas. Pet. App. 37a. FMS refused to honor NTEU's request, and the union filed an unfair labor practice charge.

2. Upon issuance of a complaint by the General Counsel, and following a hearing, the Federal Labor Relations Authority (FLRA) sustained NTEU's unfair labor practice charge. Pet. App. 32a-47a. The Authority ordered FMS to supply the names and home addresses of bargaining unit employees to the union, in accordance with its

earlier decision in *Farmers Home Administration, Finance Office, St. Louis, Missouri*, 23 F.L.R.A. 788 (1986), *aff'd in substantial part and remanded sub nom. Department of Agriculture* v. *FLRA*, 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 109 S.Ct. 831 (1989). *Id.* at 40a.

In *Farmers Home Administration*, the FLRA held that employee names and home addresses are "reasonably available" to the employer and "necessary" to unions to allow them to discharge their representational responsibilities within the meaning of Section 7114(b)(4). 23 F.L.R.A. 795-98. Noting that the Statute imposes an explicit duty upon unions in the federal sector to fairly represent the interests of all employees in the bargaining unit, without discrimination and without regard to union membership, the Authority found it "obvious that a union must be able to identify and communicate with those bargaining unit members if it is to adequately represent them." *Id.* at 796, citing 5 U.S.C. 7114(a)(1).

Consistent with an earlier decision of the Second Circuit [1] and with the private sector precedent,[2] the Authority also concluded that "the mere existence of alternative means of communication is insufficient to justify a refusal to release the information." 23 F.L.R.A. at 796. It reasoned that direct mailings to the home were "fundamentally different" from the alternatives the agency suggested—which included desk drops, direct distribution at the worksite, meetings, bulletin boards, and personal contacts—because these "are controlled in whole or in part by the agency." *Id.* Direct mailings, by contrast, cannot be subject to agency interference and would reach employees at home, where they would not be affected by the time constraints of the work day or the restraints

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[1] *American Federation of Government Employees, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986).

[2] 23 F.L.R.A. at 797, quoting *Georgetown Holiday Inn*, 235 N.L.R.B. 485, 486 (1978).

they might feel as the result of the presence of agency management at the workplace. *Id.* at 796-97.

The FLRA also rejected the agency's contention that disclosure of names and home addresses to the union would violate the Privacy Act, 5 U.S.C. 552a, because exception (b)(2) to the Privacy Act (which permits disclosures required under the Freedom of Information Act —"FOIA") applied. 23 F.L.R.A. at 792-93. Exemption (b)(6) to FOIA did not authorize withholding names and addresses because their release to the union would not constitute "a clearly unwarranted invasion of personal privacy." The public interest in disclosure of the information (demonstrated by Congress' explicit finding that collective bargaining in the federal sector is in the public interest, 5 U.S.C. 7101(a)), outweighed the privacy interests of employees in their home addresses, which, the Authority observed, were " 'not particularly compelling'." *Id.* at 793, quoting *AFGE, Local 1760*, 786 F.2d at 566.[3]

3. Following its decision, the Authority filed a petition for enforcement of its order with the court of appeals for the D.C. Circuit, and FMS filed a cross-petition for review. The petition and cross-petition in the FMS case were consolidated for briefing and oral argument with five subsequent appeals involving similar issues. Because of its significant interest in the issue and in enforcement of the FLRA's decision, the National Treasury Employees

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[3] The FLRA also ruled, in the alternative, that exception (b)(3) to the Privacy Act (5 U.S.C. 552a(b)(3)), permitting disclosure of information for a "routine use", applied. 23 F.L.R.A. at 793-794. It relied upon the publication of a Federal Register notice by the Office of Personnel Management which defined a "routine use" of personnel records to include the disclosure of information to "officials of labor organizations recognized under 5 U.S.C. Chapter 71, when relevant and necessary to their duties of exclusive representation." 49 Fed. Reg. 36956 (1984). "This standard", the FLRA observed, "is essentially the same" as the standard of Section 7114(b)(4). 23 F.L.R.A. at 794.

Union, as charging party, requested and was granted leave to intervene in the case. Thereafter, NTEU was the only federal sector union to participate in the initial briefing, oral argument, and supplemental briefing of the consolidated appeals on the merits.[4]

The court below, *sua sponte*, held the appeals in abeyance pending this Court's ruling in *Department of Justice* v. *Reporters Committee for Freedom of the Press*, No. 87-1379. After this Court's March 22, 1989 decision in *Reporters Committee*, the court of appeals issued its ruling in this case, granting the agencies' petitions for review and denying the FLRA's petition for enforcement. Pet. App. 1a-31a.

First, the court of appeals, joining the unanimous consensus of five other circuit courts,[5] affirmed the Authority's construction of the Statute, which held that names and home addresses were "reasonably available and necessary" to enable unions to discharge their representational responsibilities within the meaning of Section 7114(b)(4). It ruled that the Authority's view was reasonable and observed, moreover, that the conclusion

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[4] Two other unions, the American Federation of Government Employees, and the National Labor Relations Board Union, also intervened in the case. The NLRB Union did not file a brief or present oral argument. The American Federation of Government Employees filed an initial brief and participated in oral argument, but addressed only a collateral estoppel question peculiar to its case and not the merits of the Authority's decision.

[5] *Department of the Navy* v. *FLRA*, 840 F.2d 1131, 1137-39 (3d Cir.), *cert. denied*, 109 S.Ct. 632 (1988); *Department of the Air Force* v. *FLRA*, 838 F.2d 229, 231-32 (7th Cir. 1988); *Department of Agriculture* v. *FLRA*, 836 F.2d 1139, 1142 (8th Cir. 1988), *vacated and remanded*, 109 S.Ct. 831 (1989); *Department of Health and Human Services v. FLRA*, 833 F.2d 1129, 1131-34 (4th Cir. 1987); *AFGE, Local 1760, supra*, 786 F.2d at 557.

the FLRA reached under federal sector labor law was in accord with private sector labor law. Pet. App. 5a-6a.[6]

The court of appeals nonetheless reversed the FLRA's decision. In conflict with the conclusions of the other five circuits to address the question, and based entirely upon this Court's intervening decision in *Reporters Committee*, the court below concluded that disclosure of names and addresses to unions under the Statute is otherwise "prohibited by law," namely, the Privacy Act. Pet. App. 8a-9a. It held that 5 U.S.C. 552a(b)(2)—the Privacy Act's exception for disclosures "required under" FOIA—did not apply, because of FOIA exemption (b)(6), (5 U.S.C. 552(b)(6)), which exempts from the FOIA disclosure requirements information in "personnel or medical files" the disclosure of which would constitute "a clearly unwarranted invasion of personal privacy." *Id.* at 9a-14a.

In balancing the public interest in disclosure against employee privacy interests under FOIA exemption (b)(6), the court of appeals refused to consider the "*special* public interest in collective bargaining" expressed in the Statute, as had the FLRA and the Second, Third, Fourth, and Eighth Circuits. Pet. App. 9a-10a (original emphasis). It believed that *Reporters Committee* precluded it from considering any factor on the public interest side of the balance other than "FOIA's central purpose—'to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny'." *Id.* at 10a, quoting 109 S.Ct. at 1481 (with original emphasis). Using that standard as its benchmark, the court concluded that there was virtually no public interest in disclosure, of employee names and addresses to the union. *Id.* at 12a.

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[6] Judge Sentelle, in concurrence, expressed "certain misgivings" regarding the FLRA's interpretation of the scope of Section 7114(b)(4). Pet. App. 30a. He nonetheless joined the court's conclusion given the fact that "the weight of the authority heavily supports the road taken by the Court in upholding the FLRA's decision." *Id.* at 31a.

The court of appeals also did not consider the special context of this case in analyzing the nature of the privacy invasion. It concluded that the countervailing privacy interest of employees in their names and home addresses was "significant," because, assuming the information were freely available to any member of the public under FOIA, federal employees might be subject to unwanted mailings and solicitations from entrepreneurs or fund raisers. Pet. App. 11a-12a.

The court reiterated that it would not adjust the balance of interests it had struck "in light of the FLRA's legitimate finding that the Federal Labor Management Relations Act establishes another interest in disclosure, namely in disclosure to labor unions for collective bargaining purposes." Pet. App. 12a. It acknowledged that "the Act specifically identifies a public interest in public sector collective bargaining,"[7] and, moreover, that "the FLRA's determination here rests on a provision of that Act that expressly calls for disclosure as a means to facilitate that interest." *Id.* at 13a, citing 5 U.S.C. 7114(b)(4).

Nonetheless, the court below held these factors irrelevant because, it said, Privacy Act exception b(2) "speaks only of FOIA." Pet. App. 14a. It opined that it would require "imaginative reconstruction" to "introduce collective bargaining values into the balancing process" under FOIA, and therefore struck the balance against disclosure. *Id.*[8]

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[7] *Id.*, citing 5 U.S.C. 7101(a) and *National Treasury Employees Union* v. *FLRA*, 810 F.2d 295, 300 (D.C. Cir. 1987).

[8] The court of appeals also ruled that the routine use exception to the Privacy Act (5 U.S.C. 552(b)(3)) did not apply (*see* note 3, *supra*). Pet. App. 14a-20a. It relied upon an interpretation of OPM's published routine uses that the agency had originally set forth in an *amicus* brief it filed with the FLRA. OPM's brief interpreted the routine use of personnel files not to include release of employee names and home addresses where a union has alternative

4. In a lengthy separate opinion, Judge Ruth Ginsburg "reluctantly" concurred in the court's ruling, "with the suggestion that this issue merits consideration by decisionmakers equipped to clarify section 7114(b)(4) or to qualify *Reporters Committee*." Pet. App. 29a. While she found the logic of the court of appeals' opinion "irreproachable" in light of *Reporters Committee*, Judge Ginsburg also thought it "unlikely that Congress intended to deny to unions serving employees in the public sector lists of names and addresses of bargaining unit workers of a kind routinely supplied, under prevailing law, to unions serving employees in the private sector." *Id.* at 21a. The "disadvantage at which unions operating in the public sector are placed in comparison to unions in the private sector" she stated, "suggests the need for a second look" either by this Court (to qualify *Reporters Committee*) or by Congress (to clarify the Statute). *Id.*

"Perhaps the most persuasive indication that neither Congress nor the Supreme Court anticipated the outcome in this case," Judge Ginsburg observed, "is that the balance between the public interest in disclosure and the individual interests in privacy, when viewed unfiltered by the lens of *Reporters Committee*, overwhelmingly favors disclosure." Pet. App. 25a-26a. "The privacy interests threatened by release of the names and addresses of bargaining unit employees, while not insignificant, are far less compelling than those in *Reporters Committee* and in other cases where disclosure has been disallowed." *Id.* at 26a. On the other hand, on the public interest side of the balance, "the force of the FLRA's position, as affirmed by circuit court precedent until now uniform, is evident." *Id.* at 29a. Given these considerations, Judge Ginsburg found it "ironic that the FLRS, a measure un-

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means for contacting employees. *Id.* at 16. The Director of OPM subsequently adopted this view in a letter to the Assistant Attorney General. *Id.*

questionably designed to arm federal unions with capacity closer to that of unions in the private sector, must be interpreted to diminish the access of federal employees' unions to workers in the bargaining unit." *Id.*

REASONS FOR GRANTING THE PETITION

Review of the court of appeals' decision is warranted for three reasons. First, the court below has resolved a question of great importance to federal unions and the employees they represent in a manner that directly conflicts with the ruling of five other circuits. Second, the court of appeals' decision incorrectly interprets this Court's intervening ruling in *Reporters Committee*; in fact, the court of appeals' interpretation threatens to completely neutralize Section 7114(b)(4) of the labor statute whenever a union requests information that implicates even the most minor of privacy interests. Finally, to the extent that this Court's decision in *Reporters Committee* does compel the result the court reached below, NTEU's petition should be granted to permit this Court to qualify *Reporters Committee* and correct the anomalous and unintended result it caused in this case.[9]

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[9] Two days after the court of appeals issued its decision in this case, the American Federation of Government Employees filed a seven-page petition for a writ of certiorari seeking review of *Federal Labor Relations Authority* v. *Department of Health and Human Services, Social Security Administration*, No. 87-1115, a case consolidated with the present one in the court below. *See Petition for a Writ of Certiorari* in *American Federation of Government Employees* v. *Department of Health and Human Services, Social Security Administration*, No. 89-444. While AFGE's petition appears to seek review of the same basic question presented here, AFGE did not brief or argue the question below (*see* note 4, *supra*) and has not provided the Court with any detailed analysis of the issues raised by the lower court's decision. We respectfully request, therefore, that the Court grant our petition, regardless of its disposition of AFGE's request for review.

I. THE COURT OF APPEALS' RULING CONFLICTS WITH THE RESULTS REACHED BY FIVE OTHER CIRCUITS ON A QUESTION OF SUBSTANTIAL IMPORTANCE TO FEDERAL EMPLOYEES, THEIR UNIONS, AND THE FEDERAL LABOR-MANAGEMENT RELATIONS PROGRAM

The ruling of the court below, that the Privacy Act is violated when an agency releases the names and home addresses of unit employees to their exclusive representative as required by 5 U.S.C. 7114(b)(4), conflicts with the result reached by every other circuit to consider the issue. The Second, Third, Fourth, Seventh, and Eighth Circuits have all concluded, contrary to the D.C. Circuit, that the Privacy Act does not present a barrier to agency compliance with the obligations imposed by the labor statute and that release of employee names and home addresses to their union does not constitute a "clearly unwarranted invasion of personal privacy." [10]

The question whether federal sector unions are entitled to the names and home addresses of bargaining unit employees is of great and widespread importance to unions, to the employees they represent, and to the federal labor-management relations program.[11] Congress has explicitly found that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. 7101(a). Further, as Judge Ginsburg noted below, "it bears emphasis that Congress has also explicitly directed each public sector union to 'represent the interests of all employees in the unit it represents without dis-

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[10] *Department of the Navy* v. *FLRA*, 840 F.2d at 1135-37; *Department of the Air Force* v. *FLRA*, 838 F.2d at 232-33; *Department of Agriculture* v. *FLRA*, 836 F.2d at 1142-44; *Department of Health and Human Services v. FLRA*, 833 F.2d at 1134-36; *AFGE, Local 1760, supra*, 786 F.2d at 556-557.

[11] In fact, while the consolidated appeals in this case were pending, close to 200 other cases raising the same issue were held in abeyance by the D.C. Circuit.

crimination and without regard to labor organization membership'." Pet. App. 24a, quoting 5 U.S.C. 7114 (a) (1). Obviously, effective communication between the union and those whose interests it was elected to represent before management is vital to the union's discharge of its statutory responsibilities and to the success of the whole statutory program.[12]

Given the union's paramount need to effectively communicate with those it has been elected to represent, it is well established in the private sector (even absent an explicit statutory disclosure provision like section 7114 (b) (4)), that unions are entitled to the names and home addresses of bargaining unit employees.[13] The federal sector labor relations statute is modeled on the private sector Labor Management Relations Act and its case law.[14] Further, as this Court has observed, "in passing the [Statute], Congress unquestionably intended to strengthen the position of federal unions and to make the collective bargaining process a more effective instrument of the public interest." [15]

As Judge Ginsburg remarked below, "the public interest in the bargaining representative's ready access to unit employees appears no less vital in federal employment than in private employment." Pet. App. 24a. Further, "no policy concern Congress identified [in the Statute] warrants different treatment of unions in the public and

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[12] Unions must communicate with employees (members and nonmembers alike) in order, among other things, to establish bargaining priorities, to monitor compliance with existing agreements, and to inform employees of their rights and benefits under law and contract.

[13] Pet. App. 22a-23a (R. Ginsburg, J., concurring).

[14] Pet. App. 23a (R. Ginsburg, J., concurring).

[15] *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 107 (1983).

private sectors for the purpose at hand." [16] In fact, the lower court's decision, which logically could allow agencies to deprive public sector unions of access to employees' mailing addresses, *even when the union has no alternative means of communication available*, creates a tremendous practical disadvantage for those unions, who, in some ways, are more reliant upon the employer's release of this information than their private sector counterparts.

First, unlike the private sector, federal workplaces are all "open shop." 5 U.S.C. 7102. The union already has the means to effectively communicate with its members, and does so on a regular basis, because it has their home addresses. However, the non-member suffers by being left out of this direct communication; employees who are not union members are often less likely to either take the initiative to contact the union with their concerns or to have received the union's direct invitation to do so. Thus, the union receives most of its input from active members and is often unable to accurately assess whether member interests are shared by the non-member, whose interests it is also required to fairly represent.

Second, bargaining units in the federal sector are generally quite large, and often dispersed over a large geographic area, sometimes nationwide.[17] Stewards cannot

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[16] Pet. App. 24a; *accord*: *Department of the Navy* v. *FLRA*, 840 F.2d at 1136-37; *Department of the Air Force* v. *FLRA*, 838 F.2d at 233; *Department of Agriculture* v. *FLRA*, 836 F.2d at 1142; *Department of Health and Human Services* v. *FLRA*, 833 F.2d at 1132; *AFGE, Local 1760*, 786 F.2d at 557; *Farmers Home Administration*, 23 F.L.R.A. at 797-798.

[17] For example, there are over 1,000 employees in the FMS bargaining unit and they are dispersed nationwide. NTEU also has nationwide agreements with other federal agencies, that cover much larger groups of employees. NTEU's agreement with the Internal Revenue Service, for instance, covers 60,000 employes, and its agreement with the Customs Service covers some 12,000 workers.

provide a direct communications link to employees; the average steward/employee ratio in NTEU units is 1/50, and employees are not permitted to spend work time discussing union matters in any event.

Furthermore, bulletin boards, distribution racks and handbilling are not satisfactory means to communicate lengthy messages or solicit employee opinion and they are, in any event, subject to agency control or interference. Desk drops and office mailings are also less than adequate because of the possibility of agency interference and because many employees work in the field and do not visit their offices on a daily basis.

Finally, as the FLRA recognized (23 F.L.R.A. at 796-797), the office is hardly the place to spend the time necessary to consider the union's information or to complete questionnaires, surveys and the like. By contrast, direct home mailing provides a reliable method of getting information to employees and its content, timing and frequency is completely within the union's control. It also permits employees the time to review the information (or if they wish, discard it) in the privacy of their homes and without coercion, implicit or otherwise.

Given these considerations, as Judge Ginsburg noted below, it is "unlikely that Congress intended to deny to unions serving employees in the public sector lists of names and home addresses of bargaining unit workers of a kind routinely supplied, under prevailing law, to unions serving employees in the private sector." Pet. App. 21a. In fact, the court of appeals' ruling has the curious effect of *forbidding* the federal employer from doing that which the federal government, in its sovereign capacity, *requires* of the private employer. In view of this anomalous result and the confusion engendered by the now conflicting rulings among the courts of appeals on this important question, this Court's review is warranted.

II. THE LOWER COURT WRONGLY DECIDED THE QUESTION PRESENTED

The D.C. Circuit based its departure from the analysis and conclusions reached by the other courts of appeals entirely upon this Court's intervening decision in *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S.Ct. 1468 (1989). The lower court's application of that decision in this case, however, was incorrect, and merits review.

Reporters Committee concerned a request by representatives of the news media, made under the Freedom of Information Act, for disclosure of "rap sheet" information. This Court held that rap sheets on file with the Federal Bureau of Investigation are exempt from disclosure by virtue of FOIA exemption 7(C), which excludes from disclosure records or information compiled for law enforcement purposes, "but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

The Court reached its conclusion that rap sheets are exempt from disclosure by balancing the individual interests in privacy, and the public interest in disclosure. It reasoned that "the privacy interest in maintainng the practical obscurity of rap-sheet information will always be high," (109 S.Ct. at 1485), given the fact that rap sheets contain highly personal and damaging information that is not otherwise "freely available to the public." *Id.* at 1476-77. Further, the Court said, on the other side of the balance, no cognizable public interest warranted the invasion of this privacy interest. It held that to overcome individual privacy interests, the information requested must bear a relationship to "the basic purpose" of the Freedom of Information Act, 'to open agency action to the light of public scrutiny'." *Id.* at 1481. The Court stated that the identity of the requester and the purpose for which he sought the information should not

be a factor in assessing the public interest in disclosure when a FOIA request is made. *Id.* at 1480.

The key distinction between this case and *Reporters Committee* is, of course, that the Union's right to employee names and home addresses does not arise under the Freedom of Information Act, but under the federal labor statute. Yet, if the court below was correct when it concluded that disclosure is not "required" under FOIA, then Congress has taken away, in the general language of the Privacy Act, the right which it specifically afforded unions under the labor statute.

Indeed, in effect, under the lower court's analysis—which deliberately ignored Congress' intent to afford unions access to data within the context of the special labor-management relationship—Section 7114(b)(4) is neutralized. The lower court placed the union in the same position it would have occupied had Section 7114(b)(4) never been enacted: equivalent to any other member of the public claiming a right to disclosure of government information under FOIA. This anomalous result, however, is not, as the court below believed, compelled by *Reporters Committee.*

First, the lower court could logically have resolved this case without ever reaching the problematic "public interest" aspect of the balancing test discussed in *Reporters Committee.* As this Court's decision in *United States Department of Justice* v. *Tax Analysts,* 109 S.Ct. 2841 (1989) demonstrates, where no countervailing privacy interests are implicated, disclosure may be required under FOIA even though it would not serve FOIA's "basic purpose"—to open agency action to public scrutiny.[18] This

[18] In *Tax Analysts,* this Court ruled that FOIA required the Justice Department to release its compilations of district court tax decisions to the publishers of *Tax Notes,* a weekly magazine, despite the fact that furnishing the decisions did not serve FOIA's central purpose. *See* 109 S.Ct. at 2854 (Blackmun, J., dissenting). As Judge Ginsburg observed, "[i]t is not plausible that Congress

case, like *Tax Analysts*, does not implicate any cognizable countervailing privacy interests because here, Congress has determined that employees' names and home addresses must be made available to their exclusive representative under 7114(b)(4). In short, since Congress has deemed this information disclosable to the union under the section 7114(b)(4) calculus, any privacy expectations employees might otherwise possess are unreasonable.[19]

This analysis, unlike the lower court's, not only provides ample protection both for legitimate employee privacy interests and for the interests served by the federal labor statute, but it also avoids redundant weighing of employee privacy interests, first under Section 7114(b)(4) and again under FOIA. One aspect of the statutory determination that information is "reasonably available" and "necessary" to unions in this case, for example, was the conclusion that "the burden of disclosure on the agency *and on the employees* [was] quite modest." Pet. App. 6a (emphasis added). As the court below acknowledged (*id.* at 7a), the FLRA is capable of limiting union access to information in other kinds of circumstances where there are "legitimate claims that disclosure will impose undue burdens" either on employees or on agencies.[20]

Moreover, assuming the court should have even reached the public interest side of the balance, this Court's decision in *Reporters Committee* did not hold that invasions

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intended the FOIA to reduce the cost of publishing enterprises like *Tax Notes*, but to disarm bargaining representatives operating in the public sector." Pet. App. at 25a.

[19] *Cf.* Pet. App. 28a (Ginsburg, J., concurring) (noting that "5 U.S.C. 7114(b)(4) indicates Congress' understanding that employees have a reduced expectation of privacy regarding information that facilitates collective bargaining").

[20] *Cf. Detroit Edison* v. *NLRB*, 440 U.S. 301, 317-321 (1979) (ruling that in light of privacy concerns private sector union not entitled to obtain employees' test scores despite their relevance).

of privacy would *always* be "clearly unwarranted" when the "basic purpose" of FOIA was not served by disclosure. In *Reporters Committee*, FOIA was the only source the requestors conceivably had for their claimed right to disclosure of the rap sheets. Accordingly, in analyzing whether the public interest in disclosure warranted the privacy invasion, this Court's focus was on the basic purpose of FOIA. As even the lower court conceded, while this Court stated in *Reporters Committee* that " 'the identity of the requesting party has no bearing on the merits of his or her FOIA request'," "[n]othing in this passage suggests that the Court had considered and rejected the public interest objectives identified by Congress in other disclosure statutes." *Id.* at 13a. Moreover, "the argument here is not that the *identity* of the requestor should alter the disclosure interest, but that a congressional (non-FOIA) disclosure mandate might do so." *Id.* (original emphasis).

This case is not, like *Reporters Committee*, a "pure" FOIA case. Here, the requestor (union's) right to disclosure is based upon the federal labor statute. It frustrates Congressional intent under that Statute to ignore the public interest in collective bargaining in assessing the contours of the union's right, and nothing in *Reporters Committee* requires that result.[21]

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[21] We note here that the court of appeals also wrongly decided the question whether release of employee names and home addresses to the union would be a permissible "routine use" of the information under the Privacy Act (5 U.S.C. 552a(b)(3)). As explained *supra*, at notes 3 & 8, the Office of Personnel Management has published, as a "routine use" for personnel records, disclosure "to officials under 5 U.S.C. Chapter 71, when relevant and necessary to their duties of exclusive representation. . . ." This language, of course, tracks Section 7114(b)(4) and appears to have been originally intended to encompass all information disclosable under that provision. While an agency's official interpretation of its own regulations is generally controlling, in this case, the agency's

III. ASSUMING THAT *REPORTERS COMMITTEE* COMPELLED THE ANOMALOUS RESULT THE COURT REACHED BELOW, REVIEW IS WARRANTED TO ALLOW THIS COURT TO RE-EXAMINE AND QUALIFY THAT DECISION

As explained above, we do not believe that the *Reporters Committee* decision presents an obstacle to agency compliance with the obligations Section 7114(b)(4) imposes. However, assuming that language in *Reporters Committee* could be read to preclude disclosure in this case, review is warranted to permit this Court to either clarify or qualify that language, for purposes of the potentially numerous cases like this one, that also implicate non-FOIA disclosure statutes.[22]

As we have explained, the lower court's reading of *Reporters Committee* has the effect of neutralizing Section 7114(b)(4) whenever, as is so often the case, the union seeks information of a private nature, even when, as here, the privacy interests are, at best, modest. Rarely will a union's request for such information happen to re-

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interpretation originated in briefs submitted by agency attorneys during litigation in the original home address cases before the FLRA. The lower court should not have granted these self-serving litigation positions controlling weight.

[22] There are a number of non-FOIA disclosure statutes that permit private parties to secure potentially personal information in government records. *E.g.*, 38 U.S.C. 3301(f) (granting certain non-profit organizations access to the names and addresses of present and former members of the armed forces and their dependents); 49 U.S.C. 1905 (public access to reports and information in the possession of the National Transportation Safety Board); 20 U.S.C. 1145d (public access to reports describing conditional gifts to universities from foreign sources and identifying value of gifts and conditions). The Privacy Act would also apply to these records. Presumably, if the lower court's interpretation of *Reporters Committee* is correct, then individuals seeking information under other statutes would also have to surmount the FOIA "basic purpose" test in order to actually secure the information, despite the fact that a specific disclosure provision applies.

late to the basic purpose of FOIA—"to ensure that the government's activities be opened to the sharp eye of public scrutiny," because the union will always be seeking the data for an entirely different purpose that stems from its relationship to the government as *employer*. Under the interpretation of *Reporters Committee* the lower court felt compelled to follow, therefore, the Privacy Act threatens to terminate longstanding union access to many kinds of relevant and necessary data.[23] As Judge Ginsburg acknowledged below, in her "reluctant" concurrence, it is highly unlikely that Congress intended this result.

It seems equally unlikely that this Court foresaw, much less intended that result when it ruled on the FOIA issue in *Reporters Committee*. Review is therefore warranted to permit the Court to qualify the language and holding of *Reporters Committee*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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October 1989

[23] "In fact, unions have obtained far more personal information under section 7114(b)(4) than tne names and addresses at issue here," including performance appraisals, disciplinary records, and salary information. Pet. App. 28a (Ginsburg, J., concurring).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 7, 1988 Decided September 12, 1989

No. 87-1107

FEDERAL LABOR RELATIONS AUTHORITY,
Petitioner

v.

U.S. DEPARTMENT OF THE TREASURY,
FINANCIAL MANAGEMENT SERVICE,
Respondent

NATIONAL TREASURY EMPLOYEES UNION,
NATIONAL LABOR RELATIONS BOARD UNION,
Intervenors

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and consolidated case Nos. 87-1108, 87-1115, 87-1121
87-1129 & 87-1319

Petitions for Review and Cross-Applications
for Enforcement of Orders of the
Federal Labor Relations Authority

William E. Persina, Deputy Solicitor, Federal Labor Relations Authority ("FLRA"), with whom *Ruth E. Peters*, Solicitor, and *Pamela P. Johnson*, Attorney, FLRA, were on the brief, for petitioner in Nos. 87-1107,

87-1115 & 87-1121, and respondent in Nos. 87-1108, 87-1129 & 87-1319.

Al J. Daniel, Jr., Attorney, Department of Justice, with whom *Richard K. Willard*, and *John R. Bolton*, Assistant Attorneys General, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for respondents in Nos. 87-1107, 87-1115 & 87-1121, and petitioners in Nos. 87-1108, 87-1129 & 87-1319. *Jay B. Stephens*, United States Attorney, and *Sandra Wien Simon*, Attorney, Department of Justice also entered appearances.

Elaine D. Kaplan, with whom *Lois G. Williams* and *Gregory O'Duden* were on the brief, for intervenor National Treasury Employees Union in Nos. 87-1107 & 87-1129.

Joseph F. Henderson, with whom *Mark D. Roth* was on the brief, for intervenor American Federation of Gov't Employees, AFL-CIO in Nos. 87-1115 & 87-1319.

Lewis S. Harris entered an appearance for intervenor National Labor Relations Board Union in Nos. 87-1107 & 87-1108.

Before RUTH B. GINSBURG, WILLIAMS and SENTELLE, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WILLIAMS.

Concurring Opinion filed by *Circuit Judge* RUTH B. GINSBURG.

Concurring Opinion filed by *Circuit Judge* SENTELLE.

WILLIAMS, *Circuit Judge*: In the four decisions under review, *Department of the Treasury, Financial Management Service*, 25 FLRA 560 (1987); *Department of Health and Human Services, Social Security Administration, Baltimore, Md. and Social Security Administration, Great Lakes Program Service Center, Chicago, Illinois*, 25 FLRA 828 (1987); *Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 24

FLRA 209 (1986); *National Labor Relations Board, Office of the General Counsel and the Board*, 24 FLRA 917 (1986), the Federal Labor Relations Authority ordered government agencies to comply with union requests for the names and home addresses of agency employees working in the relevant bargaining units. The unions stated that they needed the information to perform their representational duties effectively and that they were therefore entitled to it by 5 U.S.C. § 7114(b)(4) (1982). This requires agencies

> to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data . . . (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.

Relying on its decision in *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 FLRA 788 (1986), *aff'd in substantial part and remanded sub nom. Department of Agriculture v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 831 (1989), the Authority held that agencies commit unfair labor practices when they refuse to supply authorized unions with employees' names and home addresses.[1]

Each of the agencies appealed to this court, where the cases were consolidated. They argue first that the information is not "necessary for . . . discussion, understanding, and negotiation of subjects within the scope of collective bargaining," and second that disclosure is "prohibited by law," specifically by the Privacy Act, 5 U.S.C. § 552a. We agree with all the other circuits that have

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[1] In a ruling on an issue peculiar to the NLRB case, the Authority held that a union proposal to require annual disclosure of the data was negotiable and ordered the agency to bargain over the proposal upon request by the union. This holding was justified solely by the analysis articulated in *Farmers Home Administration*. See *NLRB*, 24 FLRA at 920.

addressed the first issue that, under the deference the Authority is due on such matters, its interpretations of § 7114(b)(4) is permissible. Nevertheless, we must set aside the Authority's decisions; we are persuaded that release of the information is prohibited by the Privacy Act. Reviewing this issue de novo, we find that the Authority erred when it determined that disclosure fell within either the Act's exception for disclosures required by the Freedom of Information Act, 5 U.S.C. § 552(b)(2), or the exception for disclosures made in accordance with a "routine use," 5 U.S.C. § 552a(b)(3). Thus we grant the agencies' petitions for review and deny the FLRA's applications for enforcement.

I. Disclosure "Necessary" for the Collective Bargaining Process

To the extent that the FLRA is interpreting its own enabling statute, we cannot upset its "reasonable and defensible construction[]." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (FLRA intended by Congress to use "specialized expertise" to "give content to the principles and goals set forth in the Act"). Given this standard of review, it is not surprising that every circuit court that has reviewed the matter has upheld the FLRA's view of whether disclosure is "necessary" for the collective bargaining process under § 7114(b)(4). *Department of the Navy v. FLRA*, 840 F.2d 1131, 1137-39 (3d Cir. 1988); *Department of the Air Force v. FLRA*, 838 F.2d 229, 231-32 (7th Cir. 1988); *Department of Agriculture v. FLRA*, 836 F.2d 1139, 1142 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 831 (1989); *Department of Health and Human Services v. FLRA*, 833 F.2d 1129, 1131-34 (4th Cir. 1987); *AFGE v. FLRA*, 786 F.2d 554, 557 (2d Cir. 1986). We agree.

The agencies first contend that § 7114(b)(4)(B) requires disclosure only of data relating directly to subjects of contract negotiation; it regards the employees'

names and addresses as relating merely to "the union's relationship with bargaining unit employees." Brief for Government Agencies 21. The FLRA, on the other hand, views as sufficient a relationship to the "union's ongoing representational responsibilities." *NLRB*, 24 FLRA at 920. It found in *Farmers Home Administration* that disclosure would "enable the Union[s] to communicate effectively and efficiently, through direct mailings to individual employees." 23 FLRA at 796.

This analysis is not unreasonable. As the Fourth Circuit noted, "The Union's duties as the exclusive representative of agency employees do not begin and end abruptly with each round of negotiations but continue during the interim." *Department of Health and Human Services*, 833 F.2d at 1132. The statutory references to "discussion" and "understanding" of subjects within the scope of collective bargaining provide some support for the Authority's reading. If the information is used to discover employee concerns, clearly it can enhance the usefulness of collective bargaining.

In addition, the Authority's view corresponds to that of private sector labor relations law. In *Prudential Insurance Co. v. NLRB*, 412 F.2d 77, 83-85 (2d Cir. 1969), the court found that union communications with members of the bargaining unit related to the union's representational obligations. But compare *id.* at 85-87 (Friendly, J., dissenting) (arguing that true union purpose was recruitment of new members, a goal he found inadequate to justify forced release of employee names and addresses). As we agree that the FLRA's expansive interpretation is reasonable, we will not disturb it.

Next the agencies argue that the names and addresses are not "necessary" for the purpose stated because alternate means are available for communication between unions and government employees—desk drops, bulletin boards, "direct distributions," meetings and direct personal contact. Brief for Government Agencies 23. In

Farmers Home Administration, the FLRA noted two advantages of mailings to home addresses. First, "content, timing and frequency" of communications would be entirely within union discretion, thus excluding the possibility of agency interference. 23 FLRA at 796-97. Second, the communications would be received under circumstances where employees could give them extended attention "without regard to the time constraints inherent in their work environments [or] any restraint the employee may feel as a result of the presence of agency management." *Id.* at 797.

While there is no evidence in the record either that agency management has interfered with on-the-job communications, or that employees could not pocket materials received at work for leisurely study at home, we do not believe the Authority's finding that release is "necessary" is either arbitrary or capricious. Necessity is a matter of degree, and in many contexts courts have found a statutory requirement of necessity satisfied even when alternative means were feasible. See *NRDC v. Thomas*, 838 F.2d 1224, 1236-38 (D.C. Cir. 1988) (citing cases); *cf. Board of Trustees of State University of New York v. Fox*, 57 U.S.L.W. 5015, 5017 (U.S. June 29, 1989) (speech restriction may be no broader than "necessary" to achieve goal even though it is not least restrictive alternative). Where, as here, the Authority clearly regarded the burden of disclosure on the agency and on employees as quite modest, and was entitled to do so for purposes of the interpretation of the Federal Labor Management Relations Act (FOIA and Privacy Act matters are a different story, discussed below), modest advantages realized through at-home mailings are enough to sustain its judgment. Again, the Authority's view agrees with that of private sector labor law. *Prudential Insurance Co. v. NLRB*, 412 F.2d at 81-83; but see *id.* at 85-86 (Friendly, J., dissenting) (alternative means of communication were adequate though not ideal).

Because it believed that home mailings would facilitate union-employee communications in certain ways, the Authority adopted a presumption of necessity, which could be rebutted "where, for example, the evidence discloses that a union has acted in a manner which leads to the conclusion that the employees whose addresses would be disclosed would be in imminent danger if the union knew where they lived." *Farmers Home Administration*, 23 FLRA at 798. We assume that the Authority will be alert to any special instances where disclosure imposes such safety risks or other out-of-the-ordinary burdens. The Eighth Circuit on its own motion conditioned its affirmance of the Authority's disclosure order on the withholding of names and addresses of employees who so requested, observing that mailings by a union to those who did not wish to receive them would scarcely serve the public interest. *Department of Agriculture*, 836 F.2d at 1143-44. In response to the FLRA's petition for certiorari, however, the Solicitor General rejected this position, saying that he found no basis for an " 'individualized' veto" in the statute. See Brief for the Respondents 17-18, *FLRA v. Department of Agriculture*, 109 S. Ct. 831 (1989). (The Supreme Court remanded the case for reconsideration in light of "routine use" notices filed by the relevant agencies.) But compare *Department of the Air Force v. FLRA*, 838 F.2d 229, 233 (7th Cir. 1988) (suggesting desirability of individual check-off system, but not mandating it in light of absence of request). While we uphold the FLRA's rejection of a case-by-case approach as within its authority, we rest our conclusion on the assumption that it will be sensitive to legitimate claims that disclosure will impose undue burdens.[2]

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[2] Despite our finding below that the proposed releases do not fall within the "routine uses" exception to the Privacy Act on the facts presented here, that exception may well be available in other cases. Cf. *FLRA v. Department of Agriculture*, 109 S. Ct. 831 (1989) (remand for reconsideration in light of new "routine use" notices).

II. The Privacy Act

The statute on which the FLRA relies for its disclosure orders, 5 U.S.C. § 7114(b)(4), requires agencies to supply data only "to the extent not prohibited by law." The agencies contend that release of employee names and addresses would violate the Privacy Act, which prohibits the disclosure of personal information about federal employees without their consent. 5 U.S.C. § 552a(b) (1982). The FLRA does not dispute that the information is protected by the general language of the Privacy Act, but argues that the release falls within two explicit exceptions. First, § 552a(b)(2) allows disclosure that is "required under section 552 of this title [the Freedom of Information Act]." Second, § 552a(b)(3) allows disclosure "for a routine use." Under the latter provision, disclosure is proper only if it is in accordance with a routine use notice, published in the Federal Register by the relevant agency and describing "the categories of users and the purpose of such use." See 5 U.S.C. § 552a(e)(4)(D).

As the FLRA is not charged with a special duty to interpret either the Privacy Act or the FOIA, we do not defer to its interpretations of those statutes but review them de novo. *Illinois National Guard v. FLRA*, 854 F.2d 1397, 1400 (D.C. Cir. 1988); *Department of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988); *Professional Airways Systems Specialists v. FLRA*, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987). We do not believe that the FLRA's reliance on the FOIA exception to the Privacy Act can survive the recent Supreme Court decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989).[3] Nor are we persuaded that disclosure of employees' names and home addresses to union representatives is author-

[3] The Court granted certiorari in *Reporters Committee* on April 18, 1988, 108 S. Ct. 1467, after oral argument of this case. After the Court's decision issued on March 22, 1989, we ordered supplemental briefing.

ized by the only routine use notice relevant here, one published by the Office of Personnel Management. OPM has interpreted the routine use to require a rigorous showing of the need for direct mailings in light of the available alternate methods of communication, and we owe great deference to its interpretation of its own regulations.

A. *The Freedom of Information Act Exception*

While the Privacy Act generally prohibits disclosure of personnel information, it excepts disclosures "required under" FOIA. 5 U.S.C. § 552a(b)(2). FOIA in turn generally requires disclosure, but exempts information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Application of exemption 6 requires a balancing of the harm to the individual whose privacy is breached against the public interest served by disclosure. See *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976).

The FLRA rejected the agencies' invocation of exemption 6, stating that "[o]n balance, . . . the public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interests of individual employees in their names and home addresses." *Farmers Home Administration*, 23 FLRA at 793. With one exception,[4] the circuit court decisions upholding disclosure have similarly considered the *special* public interest in advancing collective bargaining as an aspect of the disclosure value, and, indeed, as the clinching value. See *Department of Navy*, 840 F.2d at 1135-37; *Department of Agriculture*, 836 F.2d at 1142-44; *Department of Health and Human Services*, 833 F.2d at 1134-36; *AFGE*, 786 F.2d at 556-57.

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[4] The Seventh Circuit followed our own decision in *Reporters Committee* and treated the disclosure interest as a fixed quantity for all cases, regardless of the character of the particular information at stake. *Department of Air Force*, 838 F.2d at 232-33.

In *Reporters Committee*, however, the Court made clear that under FOIA the disclosure interest must be measured in terms of its relation to FOIA's central purpose—"to ensure that the *Government*'s activities be opened to sharp eye of public scrutiny." 109 S. Ct. at 1482 (emphasis in original); see also *id.* at 1481 ("democracy cannot function unless the people are permitted to know *what their government is up to*") (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973) (emphasis in original)). However great might be the generalized public interest in FBI "rap" sheets (criminal records) of non-government officials, the Court found it irrelevant to the interest in government activities and thus to FOIA privacy balancing. Although the context in *Reporters Committee* was the special privacy exemption for law enforcement records, exemption 7(C), we see no reason why the *character* of the disclosure interest should be different under exemption 6. While exemption 6 precludes only "a *clearly* unwarranted invasion of personal privacy" (emphasis added), that difference between it and exemption 7(C) goes only to the *weight* of the privacy interest needed to outweigh disclosure.

A recent Supreme Court decision might be thought to undermine our view of the restricted character of the disclosure interest for purposes of exemption 6. *United States Department of Justice v. Tax Analysts*, 109 S. Ct. 2841 (1989), finds that Justice Department copies of district court tax decisions are encompassed by FOIA, although admittedly their release "adds nothing whatsoever to public knowledge of government [executive branch][5] operations," see *id.* at 2854 (Blackmun, J., dissenting). In *Tax Analysts*, however, the Court was not considering any FOIA exemption at all, but was defining

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[5] FOIA applies to "agencies," 5 U.S.C. § 552, which are defined to exclude both Congress and the courts of the United States. *Id.* at § 551(1).

statutory phrases such as "agency records." It chose to do so in rather neutral terms, independent of FOIA's overarching purpose. But the Court's privacy "weighing" under exemption 7(C) clearly presents a closer analogy for defining exemption 6 weighing than did the issue at stake in *Tax Analysts.*

Since *Reporters Committee,* we have balanced the disclosure interest in a list of the names and home addresses of retired or disabled federal employees against their privacy interests under exemption 6, and have found the latter predominant. *National Association of Retired Federal Employees v. Horner* ("*NARFE*"), No. 86-5446, slip op. (D.C. Cir. July 7, 1989). Indeed, *NARFE* found the interest in disclosure to be absolute zero. *Id.* at 13. Again we find the balance tilts in favor of privacy.

In analysing the privacy interest in *NARFE,* we considered the nature and scope of the privacy invasions that would flow from disclosure, as inferred from "the characteristic(s) revealed by virtue of being on the particular list." *Id.* at 9. We noted that the list requested would by its nature also disclose that the persons listed were retired or disabled and receiving a monthly annuity check from the federal government. "Any business or fundraising organization for which such individuals might be an attractive market could get from the Government, at nominal cost, a list of prime sales prospects to solicit." *Id.* at 7. Cheap access to such lists would expose the annuitants " 'to an unwanted barrage of mailings and personal solicitations,' " *id.* at 8, quoting *Minnis v. Department of Agriculture,* 737 F.2d 784, 787 (9th Cir. 1984). While the financial security of federal annuitants may somewhat exceed that of current federal workers, we doubt that the difference is enough to justify more than a very modest discount of the individuals' privacy interest, which in *NARFE* we characterized as "significant." Slip op. at 12. We note that entrepreneurs have filed FOIA requests for specific names of classes of current govern-

ment employees in order to aid them in business solicitation. See *Schwaner v. Department of the Air Force*, 698 F. Supp. 4 (D.D.C. 1988), *appeal pending*, No. 88-5341 (D.C. Cir.) (request for names and duty stations of certain ranks of Bolling Air Force personnel for purposes of life insurance solicitation).

On the disclosure side of the balance, again we find *NARFE* only modestly distinguishable. To be sure, the names of current workers might provide leads for an investigative reporter seeking to ferret out what "government is up to." But the same may be said as to the retirees involved in *NARFE*; indeed, recent retirees might sometimes, because of their relative invulnerability to retaliation, be an especially rich source of revelations. Moreover, the zealous investigator has an alternative means of access to current workers that is unavailable as to retirees—face-to-face conversation attained simply by following other leads and roaming government hallways. Concededly, access through home address lists might on occasion offer the investigator an advantage: a potential witness reached at home might assess the risk of discovery by superiors as less than if reached at work, and accordingly be more candid. While this advantage raises the public interest in disclosure above the "nothing" at which *NARFE* valued the disclosure interest in retirees' names and addresses, we do not find it enough to outweigh the workers' significant interest in privacy.

The remaining question is whether this balance should be adjusted in light of the FLRA's legitimate finding that the Federal Labor Management Relations Act establishes another public interest in disclosure, namely in disclosure to labor unions for collective bargaining purposes. The Act specifically identifies a public interest in public sector collective bargaining, see 5 U.S.C. § 7101(a); *NTEU v. FLRA*, 810 F.2d 295, 300 (D.C. Cir. 1987) (Congress believed that collective bargaining in the federal sphere would contribute to effective running of public business),

and the FLRA's determinations here rest on a provision of that Act that expressly calls for disclosure as a means to facilitate that interest, see 5 U.S.C. § 7114(b)(4). Other circuit courts have invoked these disclosure values in the Privacy Act-FOIA balancing, but they did so without explanation. *Reporters Committee* requires that this reliance on non-FOIA disclosure interests be either explained or abandoned.

Reporters Committee itself stated that "the identity of the requesting party has no bearing on the merits of his or her FOIA request," with the exception of the case where a privacy interest is based on a claim of privilege and the person protected by the privilege seeks the information for himself (giving as an example a FOIA request by the subject of a presentence report). 109 S. Ct. at 1480. But the statement does not necessarily mean that there is no exception to the general rule that the public interest in disclosure under FOIA should be defined exclusively in terms of finding out what the "government is up to." Nothing in the passage suggests that the Court had considered and rejected the relevance of public interest objectives identified by Congress in other disclosure statutes. Moreover, the argument here is not that the *identity* of the requester should alter the disclosure interest, but rather that a congressional (non-FOIA) disclosure mandate might do so.

On the other hand, the language of the Privacy Act itself is hard to square with such a broad view. Under 5 U.S.C. § 552a(b)(2), disclosure of a personal record, without the consent of the person to whom it pertains, is prohibited "unless disclosure of the record would be . . . required under section 552 of this title [FOIA]." The reading proposed by the Authority would in effect construe this as encompassing disclosures required "under FOIA *or any agency decision based on a disclosure-related statute.*" Alternatively, with more nuance but considerably more complication, it might apply to disclosures "re-

quired where the disclosure value under FOIA, and under any congressionally authorized agency disclosure decision, in the aggregate outweigh the privacy interest." One can, indeed, imagine numerous variations in which to cast this gloss.

Privacy Act exception b(2) speaks only of FOIA. We do not believe we are entitled to engage in the sort of imaginative reconstruction that would be necessary to introduce collective bargaining values into the balancing process. Consistent with the holding in *NARFE*, we find that federal employees' have privacy interests in their names and home addresses that must be protected and that the relevant public interest in disclosure, though not nothing, is outweighed.

Thus we turn to the routine use exception of the Privacy Act, an independent ground potentially supporting the FLRA's holding that release of the employees' names and addresses is not prohibited by law.

B. *The Routine Use Exception*

The "routine use" exception to the Privacy Act, 5 U.S.C. § 552a(b)(3), allows disclosure of personnel records

> for a routine use as [1] defined in subsection (a)(7) of this section [5 U.S.C. § 552a(a)(7)] and [2] described under subsection (e)(4)(D) of this section [5 U.S.C. § 552a(e)(4)(D)].

The effect of the first constraint is to confine routine use disclosures to ones that are "compatible with the purpose for which [the information] was collected," 5 U.S.C. § 552a(a)(7); the agencies raise no issue on that score. Instead, they question whether the proposed disclosure complies with the requirement that the disclosure fall within the uses "described under" 5 U.S.C. § 552a(e)(4)(D). This provision requires an agency maintaining personnel records to describe in a Federal Register notice

"each routine use of the records . . . , including the categories of users and the purpose of such use." The agencies argue that OPM's routine use notice, the only one relied on by the Authority and unions, does not encompass disclosure for the present purposes.

The Office of Personnel Management maintains "Official Personnel Files" that contain federal employees' names and home addresses. These remain its responsibility even though they are located physically in the government agencies. *Farmers Home Administration*, 23 FLRA at 794. OPM's notice of the routine uses for information from an employee's Official Personnel File provides that the records may be used:

> j. To disclose information to officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

Privacy Act of 1974: Publication of Notices of Systems of Records and Proposed New Routine Use, 49 Fed. Reg. 36,949, 36,956 (Sept. 20, 1984). The FLRA found that the data sought here was covered by OPM's paragraph j. *Farmers Home Administration*, 23 FLRA at 794.

An agency's interpretation of its own regulations is normally controlling unless it is "plainly erroneous or inconsistent" with the language of the regulation. *United States v. Larionoff*, 431 U.S. 864, 872 (1977); see also *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 30 (D.C. Cir. 1986) (agency interpretation of its own regulations given "controlling weight" by the courts). Broad deference makes especially good sense for these interpretations; as the agency has the authority to amend the regulation itself, a court's refusal to defer may simply postpone application of the agency's legitimate view. For purposes of determining the scope of OPM's routine use notice, then, an official OPM interpretation would be entitled to great deference.

Unfortunately, the record here is slightly obscure as to OPM's interpretation. The predecessor agency to OPM, the Civil Service Commission, issued guidelines to aid agencies in determining whether releases to labor unions were appropriate. *Disclosing Information Covered Under the Freedom of Information Act and the Privacy Act to Labor Organizations Recognized Under Executive Orders 11636 and 11491, As Amended,* Federal Personnel Manual, Supplement 711-1, Appendix C (Aug. 10, 1978). The guidelines did not indicate how the existence and adequacy of alternate means of communication should affect the necessity inquiry. In May 1986, the portion of the Manual containing those guidelines was deleted; the subsequent notice of the change indicated that Appendix D of the new chapter was reserved for "material concerning the disclosure of information to labor organizations." Federal Personnel Manual, Table of Changes, Basic Installment 334 (June 24, 1986). Although three years have elapsed since the deletion, OPM has not yet promulgated guidelines concerning disclosure of personnel data to unions. See Federal Personnel Manual, Supplement 711-1 (reserving Appendix D for future guidelines).

Nonetheless, on June 25, 1987 Constance Horner, then the Director of OPM, stated in a letter to Richard Willard, then Assistant Attorney General, that the "current official interpretation of the routine use is set forth in OPM's *Home Addresses Cases amicus* brief to the FLRA dated July 14, 1986 [Brief for Government Agencies, Addendum D], and will remain in effect pending formal revision and issuance of a new guideline." See Brief for Government Agencies, Addendum B. The cited *amicus* brief first provides OPM's interpretation of 5 U.S.C. § 7114(b)(4); it contends that disclosure cannot be "necessary" within the meaning of § 7114(b)(4) if "adequate alternative means exist for contacting [the employees]." *Amicus* Brief at 9. The brief goes on to provide OPM's views as to the meaning of paragraph j of its routine use

notice, adopting its previous analysis of § 7114(b)(4). Moreover, because paragraph j has a dual standard of necessity and relevance, the OPM believes that it is more restrictive than § 7114(b)(4). *Id.* at 20.

Before we decide whether *amicus* brief's interpretation is a reasonable one, we must decide whether we can properly treat it as OPM's official interpretation. Courts have sometimes declined to defer at all to agency counsel's litigative positions. See, e.g., *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (holding that "an *amicus curiae* is no more a witness than any other advocate" and refusing to accept agency counsel's "current litigating position" as authoritative). This court has more cautiously noted that "[t]here is some question . . . whether an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an 'agency position' for purposes of *Chevron* [*v. NRDC*, 467 U.S. 837 (1984)]." *Church of Scientology of California v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (en banc), *aff'd*, 484 U.S. 9 (1987).

But we think that the reasons for courts' scanting such interpretations are altogether absent here. We can identify two basic concerns for reluctance to defer to agency counsel's litigating position. First, the position may not reflect the views of the agency head(s). Judicial reliance on such a position might (in the statutory interpretation context) lock an agency into a view it never espoused. See *Women Involved in Farm Economics v. Department of Agriculture* ("*WIFE*"), No. 88-5192, slip op. at 10 (D.C. Cir. June 2, 1989). That risk may have been especially acute before *Chevron* made crystal clear that an agency interpreting a statute under an express or implied delegation of authority is free to modify its view. Quite apart from the potential lock-in, an agency informed that its stated reason was inadequate might

well reverse field; judicial affirmance on a basis never articulated by the agency could thus produce an unintended result and usurp the agency's function. See *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). In any event, no such concern exists here. Ms. Horner, the agency head, has explicitly adopted the view of the *amicus* brief. There is no risk that counsel may have acted as "mavericks disembodied from the agency that they represent." *Church of Scientology of California v. IRS*, 792 F.2d at 165 (Silberman, J., concurring).

Second, a position established only in litigation may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views. Indeed, where statutes specify procedures for a specific type of decision, one engendered solely in litigation will (typically) have skirted those procedures. *Cf. WIFE*, slip op. at 10-11 (stressing role of statutory obligations to explain actions). Here again we find nothing to justify such a concern. The way in which Director Horner adopted the brief as the official OPM statement seems in no respect to fall short of OPM's usual procedures for interpreting its routine use notice. Guidelines in the Federal Personnel Manual are drafted by OPM staff and approved by the Director, see Federal Personnel Manual, Chapter 711 at § 2-6(1) (June 24, 1986). This seems functionally indistinguishable from the legal staff's preparing the *amicus* brief and Director Horner's officially adopting it in her letter of June 25, 1987. Thus we have no reason to believe that the interpretive process here was any less thorough, less formal or less open than it would normally be. Nor, of course, did the position represent any kind of agency switch. Compare Judge Silberman's concurring opinion in *Church of Scientology*, suggesting that acceptance of an agency counsel articulation of a statutory interpretation is appropriate unless it is inconsistent with a prior administration construction, or there is "no link" between the interpretation and ad-

ministrative practice, or it is "no more than a 'current litigating position.'" 792 F.2d at 165 (citations omitted). Thus we believe it entirely appropriate to treat Mr. Horner's adoption of the *amicus* brief as an authoritative expression of the agency's views.

We note that this court recently held in *WIFE* that where an agency developed a regulation under an exemption from 5 U.S.C. § 553's requirement of a statement of the rule's "basis and purpose," counsel's explanation of the rule's underlying theory was acceptable—i.e., did not trigger the *Chenery* requirement that action unsupported by a valid *agency* explanation must be remanded for reconsideration. Slip op. at 7-13. Though the case generally supports the view taken here, it is not identical. There the agency *position* had been taken long before counsel's explanation, so the court's ultimate deference in the case was to a pre-litigation stance. On the other hand, in *WIFE*, the sole source of any agency *explanation* of its position was that of counsel in litigation, whereas here counsel and agency head are formally on record expressing the same position and explanation.

Turning to OPM's interpretation of "necessity," we find it quite reasonable. To the extent that alternate means adequately allow the unions to communicate with federal employees, it is reasonable to conclude that it is not "necessary" for the unions to be able to send mail to employees' homes. See *Prudential Insurance Co.*, 412 F.2d at 85-87 (Friendly, J., dissenting) (in view of alternate methods of communication, release of names and home addresses was not a "necessity for union organization and representation"). Although it may seem anomalous that the FLRA and OPM interpret such similar language differently (especially as both § 7114(b)(4) and paragraph j evolved from language developed by the Authority's institutional predecessor, the Federal Labor Relations Council), we cannot require conformity as long as both interpretations are reasonable.

Thus paragraph j of OPM's routine use notice, as explained by the *amicus* brief, does not authorize the release of employees' names and home addresses to unions without some showing that the alternate means of communication are insufficient. In the absence of any such showing here, we set aside the FLRA's determinations that the routine use exception of the Privacy Act applies.

* * *

At oral argument and in supplemental briefing, the union in the case concerning the Social Security Administration argued that the agency was collaterally estopped from defending itself on the merits before this court because of the Second Circuit's decision in *AFGE v. FLRA*, 786 F.2d 554 (2d Cir. 1986). We find collateral estoppel inappropriate here because there has been "a change or development in the controlling legal principles," namely the Supreme's Court's decision in *Reporters Committee*, that has rendered the first determination "obsolete or erroneous, at least for future purposes." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599 (1948); see also *Graphic Communications International Union v. Salem-Gravure Division of World Color Press, Inc.*, 843 F.2d 1490, 1493 (D.C. Cir. 1988) ("issue preclusion does not apply when there has been an intervening change in legal principles").

* * *

We defer to the FLRA's view that disclosure of employees' name and home addresses are "necessary" for purposes of collective bargaining under § 7114(b)(4) of the Federal Labor Management Relations Act. Nevertheless, we must set aside its decisions because release of that information would violate the Privacy Act. We find that neither the Act's exception for disclosure required by FOIA nor its exception for disclosure pursuant to a routine use notice is applicable in these cases. We deny the Authority's applications for enforcement and grant the government agencies' petitions for review.

So ordered.

GINSBURG, RUTH B., *Circuit Judge, concurring*: In common with our sister circuits, I believe it unlikely that Congress intended to deny to unions serving employees in the public sector lists of names and addresses of bargaining unit workers of a kind routinely supplied, under prevailing law, to unions serving employees in the private sector. However, the logic of the court's opinion is irreproachable. The broad cross-reference in 5 U.S.C. § 7114 (b) (4)—"to the extent not prohibited by law"—picks up the Privacy Act unmodified; that Act, in turn, shelters personal records absent the consent of the person to whom the record pertains, unless disclosure would be required under the Freedom of Information Act (FOIA).

Once placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public. True, unions have a special interest in identifying and communicating with persons in the bargaining unit, an interest initially accommodated by 5 U.S.C. § 7114(b) (4). The bargaining process facilitation interest is ultimately unavailing, however, because it "falls outside the ambit of the public interest that the FOIA was enacted to serve," *i.e.*, the interest in advancing "public understanding of the operation or activities of the government." *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468, 1482-83 (1989).

The disadvantage at which unions operating in the public sector are placed in comparison to unions in the private sector, if the former lack access to the lists sought here, suggests the need for a second look. Had the Supreme Court envisioned this case, would it have qualified *Reporters Committee*'s statement of the public interest relevant under the FOIA? Informed of the consequences of the Federal Labor Relations Statute's broad cross reference, would Congress opt to provide bargaining representatives in the public sector with the names and addresses of unit employees? These are questions now ripe

for consideration by the appropriate lawmaking or precedent-setting authorities.

Every circuit that considered the bargaining unit name and address list issue prior to *Reporters Committee* reached a result in conflict with the disposition we announce today.[1] Those circuits were mindful of the congressional recognition that "labor organizations and collective bargaining in the civil service are in the public interest," 5 U.S.C. § 7101(a) (1982); they sought to avoid discrepancies in the treatment of public and private sector unions dissonant with federal labor relations policy. Noteworthy too, the ruling that *Reporters Committee* impels this court to make appears an anomaly when compared with *United States Dep't of Justice v. Tax Analysts*, 109 S. Ct. 2841 (1989), the Supreme Court's most recent pronouncement on the FOIA. Most significantly, as our sister circuits' analyses indicate, there is at stake here no more than a modest privacy interest, one outbalanced by a broader view of the public interest than *Reporters Committee* permits.

I.

Private sector employers are required under current law to provide unions with bargaining unit employees' names and addresses. *See NLRB v. Associated Gen'l Contractors*, 633 F.2d 766, 773 (9th Cir. 1980) (disclosure required under 29 U.S.C. § 158(a)(5)'s duty to bargain in good faith); *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1113 (1st Cir. 1975) (same); *United*

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[1] *See* United States Dep't of the Navy v. FLRA, 840 F.2d 1131 (3d Cir.), *cert. denied*, 109 S. Ct. 632 (1988); United States Dep't of the Air Force v. FLRA, 838 F.2d 229 (7th Cir.), *cert. denied*, 109 S. Ct. 632 (1988); United States Dep't of Agriculture v. FLRA, 836 F.2d 1139 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 831 (1989); United States Dep't of Health & Human Servs. v. FLRA, 833 F.2d 1129 (4th Cir. 1987); AFGE, Local 1760 v. FLRA, 786 F.2d 554 (2d Cir. 1986).

Aircraft Corp. v. NLRB, 434 F.2d 1198, 1204 (2d Cir. 1970) (same), *cert. denied*, 401 U.S. 993 (1971); *Prudential Ins. Co. of Am. v. NLRB*, 412 F.2d 77 (2d Cir.) (same), *cert. denied*, 396 U.S. 928 (1969); *Standard Oil Co. v. NLRB*, 399 F.2d 639, 640 (9th Cir. 1968) (same); *cf. NLRB v. Wyman-Gordon*, 394 U.S. 759, 767 (1969) (employer must provide candidate unions with names and addresses prior to election of bargaining representative). *But see Prudential*, 412 F.2d at 85-86 (Friendly, C.J., dissenting) (because alternative means of communication are adequate though not ideal, 29 U.S.C. § 158(a)(5) does not require disclosure); *cf. Shell Oil Co. v. NLRB*, 457 F.2d 615 (9th Cir. 1972) (disclosure not required where there was prior harassment of nonstriking workers and employer offered to give list to independent mailing agency for use in union mailings).

Private sector labor-relations case law, although not strictly binding as precedent, generally provides strong guidance in parallel public sector matters. *See NTEU v. FLRA*, 810 F.2d 295, 299-300 (D.C. Cir. 1987); *Library of Congress v. FLRA*, 699 F.2d 1280, 1286-87 (D.C. Cir. 1983); *see also United States Dep't of the Navy v. FLRA*, 840 F.2d 1131, 1138 (3d Cir.), *cert. denied*, 109 S.Ct. 632 (1988); *United States Dep't of Health & Human Servs. v. FLRA*, 833 F.2d 1129, 1132 (4th Cir. 1987). This is so because Congress modeled the Federal Labor Relations Statute (FLRS) on the Labor Managemen Relations Act (LMRA);[2] in the drafting process, the legislators paid close attention to judicial decisions in private sector labor law cases. *See NTEU*, 810 F.2d at 299. The two statutes present similar definitions of collective bargaining and serve similar purposes. *See United States Dep't of Health & Human Servs.*, 833 F.2d at 1132. Tell-

[2] "In passing the [FLRS]," the Supreme Court observed, "Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest . . . ." Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 107 (1983).

ingly, the opening section of the FLRS states: "[E]xperience *in both private and public sector employment* indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing . . . *safeguards the public interest.*" 5 U.S.C. § 7101(a)(1) (1982) (emphasis added). No policy concern Congress identified warrants different treatment of unions in the private and public sectors for the purpose at hand. *See United States Dep't of Health & Human Servs.*, 833 F.2d at 1132.

It bears emphasis that Congress has explicitly directed each public sector union to "represent[] the interests of all employees in the [bargaining] unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114(a)(1) (1982). Effective communication on workplace and work-related issues —for example, impending workforce reductions and available labor protections—is surely facilitated by home mailings. Other means of union-worker communication—such as worksite visits, meetings, and newsletter distributions at the workplace—do not afford the same comprehensive coverage. Again, as other circuits have said,[3] the public interest in the bargaining representative's ready access to unit employees appears no less vital in federal employment than in private employment. It thus seems to me nearly certain that Congress did not anticipate the outcome *Reporters Committee* requires us to reach in this case.

II.

Set against the outcome in *Tax Analysts*, the Supreme Court's most recent interpretation of the FOIA, the holding that the Information Act blocks public sector unions

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[3] *See United States Dep't of the Navy*, 840 F.2d at 1136-37; *United States Dep't of the Air Force*, 838 F.2d at 233; *United States Dep't of Agriculture*, 836 F.2d at 1142; *United States Dep't of Health & Human Servs.*, 833 F.2d at 1132; *AFGE, Local 1760*, 786 F.2d at 557.

from access to federal employees' names and addresses becomes all the more anomalous. *Tax Analysts* held that the FOIA requires the Department of Justice to release its compilations of district court tax decisions to the publishers of *Tax Notes*, a weekly magazine. *See* 109 S. Ct. at 2853. Justice Blackmun centered his dissent on the point that release of the requested court orders and opinions "adds nothing whatsoever to public knowledge of government operations." *See id.* at 2854 (Blackmun, J., dissenting).

As the court's opinion in the instant case correctly points out, no privacy exemption militated against disclosure in *Tax Analysts*. *See* Ct. Op. at 10-11.[4] Nonetheless, the juxtaposition of *Tax Analysts* and our decision today reveals a tension in the Supreme Court's interpretation of the FOIA: the Information Act, in the first instance, demands no showing at all of "public interest"; yet, once a privacy interest, however modest, is implicated, the Act forbids disclosure of information that advances a significant public interest (here, the interest in informed collective bargaining), if that interest is unrelated to FOIA's "core purpose." *See Reporters Committee*, 109 S. Ct. at 1483. It is not plausible that Congress intended the FOIA to reduce the cost of publishing enterprises like *Tax Notes*, but to disarm bargaining representatives operating in the public sector.

III.

Perhaps the most persuasive indication that neither Congress nor the Supreme Court anticipated the outcome in this case is that the balance between the public interest

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[4] As the court's opinion explains, the ruling in *Tax Analysts*—that the FOIA calls for disclosure of records that do not advance public knowledge of "what government is up to"—does not reach back to modify *Reporters Committee*'s restriction on the public interest cognizable in privacy exemption balancing.

in disclosure and the individual interests in privacy, when viewed unfiltered by the lens of *Reporters Committee*, overwhelmingly favors disclosure. First, the privacy interests threatened by release of the names and addresses of bargaining unit employees, while not insignificant, are far less compelling than those in *Reporters Committee* and in other cases where disclosure has been disallowed. Most circuits have concluded that privacy interests in names and addresses alone are "not particularly compelling." *AFGE, Local 1760 v. FLRA*, 786 F.2d 554, 556 (2d Cir. 1986); *see also NARFE v. Horner*, No. 86-5446, slip op. at 13 (D.C. Cir. July 7, 1989) ("modest" but enough to prevent disclosure absent any cognizable public interest); *United States Dep't of the Navy*, 840 F.2d at 1137 (3d Cir.) ("minimal"); *United States Dep't of the Air Force v. FLRA*, 838 F.2d 229, 232 (7th Cir. 1988) ("minuscule"), *cert. denied*, 109 S. Ct. 632 (1988); *United States Dep't of Agriculture v. FLRA*, 836 F.2d 1139, 1143 (8th Cir. 1988) (agreeing that "average employee's privacy interest in his home address is not particularly compelling," but observing that "not all employees are average," and therefore ordering disclosure of names and addresses unless employee requests that information be kept confidential), *vacated and remanded*, 109 S. Ct. 831 (1989); *Kurzon v. Department of Health & Human Servs.*, 649 F.2d 65, 69 (1st Cir. 1981) (intrusion so "limited" that exemption 6 balancing not even triggered); *Ditlow v. Schultz*, 517 F.2d 166, 170 (D.C. Cir. 1975) ("less than a substantial invasion of privacy"). *But compare AFGE Local 1923 v. United States Dep't of Health & Human Servs.*, 712 F.2d 931, 932 (4th Cir. 1983) ("strong privacy interest") *with United States Dep't of Health & Human Servs. v. FLRA*, 833 F.2d 1129, 1135 n.8 (4th Cir. 1987) (noting that issue whether employees have "a strong privacy interest" in their home addresses is a "close one" and citing dissent of Winter, C.J., in *AFGE Local 1923*, 712 F.2d at 934

(maintaining that "there is little privacy in one's name and home address")).

In all but one of the circuit decisions that have found privacy interests in names and addresses sufficient to bar disclosure, the requested data would have conveyed further information of a more revealing and commercially valuable character.[5] *See NARFE*, slip op. at 7 (list indicated that individuals were retired or disabled and received an annuity); *Aronson v. United States Dep't of Housing & Urban Dev't*, 822 F.2d 182, 186 (1st Cir. 1987) (list revealed that individuals owed substantial sums); *Minnis v. United States Dep't of Agriculture*, 737 F.2d 784, 787 (9th Cir.) (list revealed individuals' interests in water sports and the out-of-doors), *cert. denied*, 471 U.S. 1053 (1985); *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 528 (6th Cir. (requester sought listing of loan amounts), *cert. denied*, 469 U.S. 1034 (1984); *Committee on Masonic Homes of R.W. Grand Lodge v. NLRB*, 556 F.2d 214, 220 (3d Cir. 1977) (information indicated union preference and contained thumbnail sketch of job classification and status); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 137 (3d Cir. 1974) (list revealed family status and interest in wine-making). Here the list would reveal nothing more than the name, address, and bargaining unit of each individual. The list would lump together employees of a variety of grade and pay levels and disclose no additional, personal information that might be embarrassing or enhance the value of the list for solicitation purposes.

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[5] The one exception was AFGE Local 1923 v. United States Dep't of Health & Human Servs., 712 F.2d 931 (4th Cir. 1983). In United States Dep't of Health & Human Servs. v. FLRA, 833 F.2d 1129 (4th Cir. 1987), the same circuit distinguished *AFGE Local 1923* as arising under the FOIA alone rather than under the FOIA through 5 U.S.C. § 7114(b) and cited the dissent of Winter, C.J., in *AFGE Local 1923* with approval. *See* 833 F.2d at 1135 n.8.

The privacy invasion threatened by release of the bare names and addresses in this case pales in comparison to the privacy invasion threatened by release of the rap sheet in *Reporters Committee.* An individual's mailing address, unlike the scattered bits of information relevant to criminal matters compiled in a rap sheet, has no pejorative connotations. The local phone book prints names and addresses for most permanent residents of a community. In contrast, the rap sheet at issue in *Reporters Committee* contained a collection of information not "freely available," information "hard-to-obtain," indeed impossible to amass without "diligent search of courthouse files, county archives, and local police stations throughout the country." *See Reporters Committee,* 109 S. Ct. at 1477.

Furthermore, the Supreme Court emphasized in *Reporters Committee* "the web of federal statutory and regulatory provisions that limit the disclosure of rap-sheet information." *Id.* Again in conspicuous contrast, 5 U.S.C. § 7114(b)(4) indicates Congress' understanding that employees have a reduced expectation of privacy regarding information that facilitates collective bargaining. In fact, unions have obtained far more personal information under section 7114(b)(4) than the names and addresses at issue here. Examples include performance appraisals and disciplinary records. *See, e.g, AFGE v. FLRA,* 793 F.2d 1360 (D.C. Cir. 1986) (disciplinary records); *Internal Revenue Service and NTEU,* 25 F.L.R.A. (No. 13) 181 (1987) (performance appraisal). Indeed, one of the unions in the cases consolidated in this review proceeding has already obtained employee salary information. *See* Joint Appendix at 116.

Finally, in comparing the lesser privacy invasion involved in this case to the large one at stake in *Reporters Committee,* one might note that this case presents a question under exemption 6 rather than exemption 7(C). The Supreme Court observed in *Reporters Committee* that

exemption 6 differs from exemption 7(C) in two key ways. First, to fall within exemption 6, the invasion of privacy must be "clearly" unwarranted; the adverb "clearly" is omitted from exemption 7(C). Second, exemption 6 prohibits only disclosures that "would constitute" an invasion of privacy while exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. *See Reporters Committee*, 109 S. Ct. at 1472-73.[6]

As the court's opinion in this case states, these textual differences concern only the privacy side of the balance; they do not justify our consideration of a broader range of public interests under exemption 6. *See* Ct. Op. at 10. However, they do make the point that the privacy claim before us is of a relatively lower value in the FOIA's calculus.

Turning to the public interest side of the balance, the force of the FLRA's position, as affirmed by circuit court precedent until now uniform, is evident. *See supra* pp. 2-4. To recapitulate, it seems to me ironic that the FLRS, a measure unquestionably designed to arm federal unions with capacity closer to that of unions in the private sector, must be interpreted to diminish the access of federal employees' unions to workers in the bargaining unit.

CONCLUSION

For the reasons stated, and with the suggestion that this issue merits consideration by decisionmakers equipped to clarify section 7114(b)(4) or to qualify *Reporters Committee*, I reluctantly concur in the court's opinion and judgment.

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[6] *See* NARFE v. Horner, No. 86-5446, slip op. at 10 (D.C. Cir. July 7, 1989) (describing as exemption 6 threshold, proof of "a substantial probability," *i.e.*, "little reason to doubt," "that disclosure will cause an interference with personal privacy").

SENTELLE, *Circuit Judge*, concurring: I completely concur in the Court's conclusion in this case and find the Court's reasoning to be wholly sound on all points concerning the question addressed in Part II of the opinion. I write separately only to express certain misgivings as to Part I.

I question whether the FLRA interpretation of 5 U.S.C. § 7114(b)(4) (1982) is one to which we should defer. The FLRA interpretation upholds the Unions' view that the names and home addresses of agency employees are included within the statutory mandate requiring agencies

> to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data . . . which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining . . . .

Id. § 7114(b)(4)(B).

The statute does not require the agencies to provide the exclusive representative with all information useful to its union activities, but only data that are "reasonably available and *necessary for full and proper discussion, understanding, and negotiation within the scope of collective bargaining.*" *Id.* (emphasis added). The FLRA's discretion to define the terms within section 7114(b)(4) is far from unbridled. "Collective bargaining" is defined by Congress as

> the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees . . . to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in

> this paragraph does not compel either party to agree to a proposal or to make a concession . . . .

5 U.S.C. § 7103(a)(12) (1982). The Authority's construction of the Agency's obligations under section 7114(b)(4) appears to be outside the confines of the discretion left to the Authority after the erection of the statutory definitional wall. The names and home addresses of employees are no doubt useful to the Unions in their other representational activities and in recruitment. (*Cf. Prudential Ins. Co. v. NLRB*, 412 F.2d 77, 86 (2d Cir. 1969) (Friendly, J., dissenting) (arguing that recruitment is the true goal of private sector unions seeking employee names and addresses). However, section 7114(b)(4) only mandates the furnishing of data necessary to the collective bargaining purpose as defined in section 7103(a)(12). There is no such mandate for data necessary to the Unions' other concededly useful and even commendable purposes. The deference to Agency construction mandated in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), rests on the underpinning that Congress, by leaving a gap for the Agency to fill, has made a "delegation of authority to the agency to elucidate a specific provision of the statute by regulation," *id.* at 843-44. Because Congress, in the legislation under review, itself walled-in the gap and excluded to an extent the FLRA from its present construction of the statute, the FLRA's construction approaches the limits of the zone in which we owe it *Chevron* deference.

As the Court's opinion recites, however, the weight of authority heavily supports the road taken by the Court in upholding the FLRA's decision, and I join, if somewhat reluctantly, my colleague's opinion on this point. I reiterate that I find the Court's reasoning in Part II to be sound and convincing, and its conclusion wholly correct.

APPENDIX B

25 FLRA No. 42

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 3-CA-60380

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE,
Respondent

and

NATIONAL TREASURY EMPLOYEES UNION,
Charging Party

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding, granting the General Counsel's motion for summary judgment and finding that the Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that Respondent be ordered to take appropriate remedial action. Thereafter, the Respondent filed exceptions to the Judge's Decision and a supporting brief. No opposition to the exceptions was filed.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), we have reviewed the rulings of the Judge made at the hearing and find that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of

the Judge's Decision, the exceptions, and the entire record, we adopt the Judge's findings, conclusions and recommended Order.

Issued, Washington, D.C., February 5, 1987.

/s/ Jerry J. Calhoun
JERRY J. CALHOUN, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER, III Member

/s/ Jean McKee
JEAN MCKEE, Member

FEDERAL LABOR RELATIONS AUTHORITY

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 3-CA-60380

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE,
Respondent

and

NATIONAL TREASURY EMPLOYEES UNION,
Charging Party

CERTIFICATE OF SERVICE

I hereby certify that copies of the Decision and Order of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

/s/ Evon H. Bumphray
FLRA DOCKET CLERK

Arthur S. Rosenzweig
Department of the Treasury
Financial Management Service
Treasury Annex
15th & Madison Place, NW., Room 412
Washington, D.C. 20226

Virginia G. Cooke
Labor Relations Officer
Department of the Treasury
Financial Management Services
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Brian W. Mellor, Assistant Counsel
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S. Jesse Reuben, Regional Director
Ira Sandron, Counsel for the
General Counsel
Federal Labor Relations Authority
Resion III
P.O. Box 33758
Washington, D.C. 20033-5758

Allan D. Heuerman
Assistant Director for Employee,
Labor and Agency Relations
U.S. Office of Personnel Management
1900 E Street, NW., Room 7412
Washington, D.C. 20415

DATED: February 5, 1987
Washington, D.C.

OALJ-87-12

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

Case No. 3-CA-60380

DEPARTMENT OF THE TREASURY
FINANCIAL MANAGEMENT SERVICE,
Respondent

and

NATIONAL TREASURY EMPLOYEES UNION,
Charging Party,

Arthur S. Rosenzweig, Esquire
For the Respondent

Ira Sandron, Esquire
For the General Counsel

Bryan W. Mellor, Esquire
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et seq.**, and the

---

* For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, *e.g.*, Section 7114(b)(4) will be referred to, simply, as "§ 14(b)(4)".

Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, *et seq.*, concerns a request for the names and home addresses of bargaining unit employees.

This case was initiated by a charge filed on June 12, 1986 (G.C. Exh. 1(a)), which alleged violations of §§ 16 (a)(1) and (8) of the Statute and a first amended charge filed on August 15, 1986 (G.C. Exh. 1(b)), which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute. The Complaint and Notice of Hearing issued on August 26, 1986 (G.C. Exh. 1(c)), alleged violations of §§ 16(a)(1), (5) and (8) of the Statute, and set the hearing for November 5, 1986, pursuant to which a hearing was duly held on November 5, 1986, in Washington, D.C., before the undersigned. At the conclusion of the testimony and evidence, I granted the motion of General Counsel for summary judgment. All parties were given leave to mail briefs, in support of the granting of summary judgment or in opposition thereto, on or before November 19, 1986. No post-hearing briefs were filed. On the basis of the entire record, I make the following findings and conclusions:

Findings

1. The National Treasury Employee Union (NTEU) is the exclusive representative of Respondent's employees in a nation-wide consolidated unit consisting of all of Respondent's nonprofessional General Schedule and Wage Grade employees. NTEU's Chapter 202 (hereinafter referred to as the "Union") is the agent of NTEU acting upon its behalf in representing bargaining unit employees.

2. On, or about April 29, 1986, the Union requested that Respondent furnish it with the names and home addresses of ". . . all bargaining unit employees in FMS" (G.C. Exh. 3), and stated that, "The purpose of this request is for the Union to have an opportunity to reach all of our employees regardless of restricted or security areas they may work in." (G.C. Exh. 3).

3. By letter dated May 5, 1986, Respondent refused to furnish the Union the names and home addresses requested stating,

> "This is in response to your April 29, 1986 letter asking for the names and mailing addresses of all bargaining unit employees. A recent FLRA decision on this very issue held that the Unions are not normally entitled to this information. The Authority balanced the rights of the exclusive bargaining representative and the privacy rights of the employees. It concluded that as long as there were other reasonably effective means of contacting the employees, the Union was not entitled to this information. Accordingly, I must deny your request.
>
> "Management is interested in cooperating with NTEU to the extent permitted by law. Therefore, if you are unable to contact any FMS employee bargaining unit employee because that person is either assigned to a remote work site or absent for an extended period, please contact a Labor Relations Specialist for assistance in either locating that employee or forwarding documents to that person." (G.C. Exh. 4).

4. The parties stipulated as follows:

> "The information requested by the Union, described in Paragraph 6 of the Complaint, is normally maintained by Respondent, based on information supplied by bargaining unit employees, in the regular course of business, is reasonably available and does not constitute guidance, advice, counsel, or training for management officials, or supervisors relating to collective bargaining." (Tr. 8; see, also, Respondent's Answer, G.C. Exh. 1(e)).

5. Mr. Clinton Weems, President of Chapter 202 and who made the request for names and home addresses, tes-

tified there was no correspondence between the Union and Respondent other than General Counsel Exhibits 3 and 4 (Tr. 7); that he had no conversations bearing on the purpose of his request with Respondent (Tr. 17-18); and that Respondent never asked why he wanted the information (Tr. 18).

6. Ms. Virginia Gaye Cook, Labor Relations Officer for the Financial Management Service (Tr. 23), testified that the Financial Management Service consists of Headquarters and seven regional financial centers; that there is a single nationwide bargaining unit represented by NTEU; that in the headquarters area in Washington there are six different locations, including the Treasury Annex, Hyattsville, Maryland (where most of its employees are located), the Shoreham Building, the Premier Building, and supplies at the Ford plant in Alexandria, Virginia (Tr. 38); and that there are about 2400 employees in Financial Management Service, not all of whom are in the bargaining unit (Tr. 29). Ms. Cook testified that, to her knowledge, no Union official had ever complained about trouble in contacting bargaining unit employees (Tr. 28). General Counsel's objection to questions directed to Ms. Cook concerning what methods the Union has employed to communicate with bargaining unit employees was sustained; Respondent was permitted to make a proffer of proof, to the effect that the contract of the parties provides various methods of contact, including official time for Union officials to meet with employees, permitting use of bulletin boards, desk drops, "take-one" distribution in the cafeteria area, that Respondent has provided names, location and office telephone numbers of employees, and that these methods are reasonable and effective (Tr. 31-32, 33). General Counsel objected to Respondent's proffers of proof and they were rejected.

Conclusion

Respondent concedes that the facts are not in dispute and stated,

> ". . . The operative facts concerning the complaint are not in issue, the Union submitted a formal request for the names and home addresses of FMS employees and management refusal to provide it to them." (Tr. 22).

Respondent's position is, as quite succinctly stated by Mr. Rosenzweig,

> ". . . the information requested by the Union was not necessary for a full and proper discussion understanding and negotiation of subjects within the scope of collective bargaining . . . that NTEU has represented FMS for several years and has never complained to management about difficulty with contacting employees, or about being constrained in the type of contacts it has . . . that reasonable and effective alternative means exist to contact employees without invading their privacy. . . We urge the Authority to consider the alternative means available to the Union and then to apply the appropriate balancing test." (Tr. 22-23).

The Authority's decision in *Farmers Home Administration, Finance Office, St. Louis, Missouri*, 23 FLRA No. 101 (October 31, 1986) (G.C. Exh. 2) is both controlling and dispositive of Respondent's contentions. Thus, the Authority held, in part, as follows:

> "On balance, we find that the public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interests of individual employees in their names and home addresses. Disclosure of the requested information would not constitute a clearly unwarranted invasion

of personal privacy and does not fall within the (b)(6) exemption to the FOIA. Since the information does not fall within the exemption, its disclosure is required under the FOIA and, under exception (b)(2) to the Privacy Act, its release is not prohibited by law. (23 FLRA No. 101 at p. 6).

. . .

". . . we conclude that the disclosure of the names and home addresses of bargaining unit employees to the Union is necessary within the meaning of section 7114(b)(4) of the Statute for the Union to discharge its statutory obligations. Consistent with that conclusion, we find that the disclosure of the information sought here falls within the routine use established by OPM, and its disclosure is therefore a routine use under exception (b)(3) of the Privacy Act. Therefore, even if the disclosure was not authorized under exception (b)(2) of the Privacy Act, relating to the FOIA, it is authorized under exception (b)(3).

"Release of the requested information is therefore not prohibited by law. It may be released pursuant to exceptions (b)(2) and (3) of the Privacy Act. (23 FLRA No. 101 at p. 7).

". . . We find that the statutory requirement concerning sufficiency of a request under section 7114(b)(4) is satisfied for requests such as that involved here when a general written request for the information is made. A precise explication of the reasons for the request involved here is not necessary . . . an exclusive representative's need for the names and home addresses of the bargaining unit employees it is required to represent is so apparent and essentially related to the nature of exclusive representation itself, that unlike requests for certain types of other information, an agency's duty to supply names and

home addresses information does not depend upon any separate explanation by the union, of its reasons for seeking the information. (23 FLRA No. 101, at p. 8).

. . .

"We will not review the adequacy of alternative methods of communication on a case-by-case basis . . . we find that the mere existence of alternative means of communication is insufficient to justify a refusal to release the information. Further, we find that it is not necessary for us to examine the adequacy of alternative means in cases involving requests for names and home addresses because the communication between the unit employees and their exclusive representative which would be facilitated by the release of names and home addresses information is fundamentally different from other communication through alternative means which are controlled in whole or in part by the agency. When using direct mailings, the content, timing, and frequency of the communication is completely within the discretion of the union and there is no possibility of agency interference in the distribution of the message. Further, direct mailings reach unit employees in circumstances where those employees may consider the union's communication without regard to the time constraints inherent in their work environments, and in which any restraint the employee may feel as a result of the presence of agency management in the workplace is not present. We find the names and home addresses of unit employees are necessary and should be provided whether or not alternative means of communication are available." (23 FLRA No. 101, at pp. 9-10).

Respondent was required to furnish the names and home addresses requested by the Union, which were normally maintained by Respondent in the regular course of

business and were reasonably available, without regard to whether alternative means of communication were available or adequate. Respondent's refusal to furnish the requested information violated §§ 16(a)(1), (5) and (8) of the Statute; the granting of General Counsel's motion for summary judgment at the conclusion of the hearing is affirmed; and it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. 7118, the Authority hereby orders that Department of the Treasury, Financial Management Service shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of National Treasury Employees Union, the exclusive representative of its employees, and its Chapter 202, the names and home addresses of all bargaining unit employees in Financial Management Service.

(2) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Furnish the names and home addresses as requested by the National Treasury Employees Union's Chapter 202 by its letter of April 29, 1986.

(b) Post at all of its facilities where bargaining unit employees represented by the National Treasury Employees Union, including its National Headquarters and Financial Center, Washington, D.C. and at its Regional Financial Centers, copies of the attached

Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a senior official of the Financial Management Service and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of Region III, Federal Labor Relations Authority, 1111 18th Street, N.W., P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

/s/ William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 26, 1986
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY AND IN ORDER TO EFFECTUATE THE POLICIES OF CHAPTER 71 OF TITLE 5 OF THE UNITED STATES CODE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the National Treasury Employees Union, the exclusive representative of our employees, the names and home addresses of all bargaining unit employees in the Financial Management Service.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the names and home addresses as requested by the National Treasury Employees Union's Chapter 202 by its letter of April 29, 1986.

_____

(Agency or Activity)

Dated: _____ By: _____

(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region III, whose address is: 1111 18th Sereet, N.W., Suite 700, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. 3-CA-60380, were sent to the following parties:

/s/ Becky J. Black

Arthur S. Rosenzweig, Esquire
Department of the Treasury
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Virginia G. Cooke
Labor Relations Officer
Department of the Treasury
Financial Management Service
Pennsylvania Avenue & Madison Place, N.W.
Washington, D.C. 20226

Dated: November 26, 1986
Washington, D.C.

(2)

COPY

No. 89-566

Supreme Court, U.S.
FILED
NOV 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

TSAUSHU C. LACKLAND,

Petitioner,

v.

STATE UNEMPLOYMENT APPEALS BOARD,

Respondent.

J.C. PENNY COMPANY,

Real Party In Interest.

ON A PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

JOHN K. VAN DE KAMP
Attorney General

CHARLTON G. HOLLAND, III
Assistant Attorney General

STEPHANIE WALD
Supervising Deputy Attorney General

350 McAllister Street, Room 6000
San Francisco, California 94102
Telephone: (415) 557-0739

Attorneys for Respondent

BEST AVAILABLE COPY

38 pp

QUESTIONS PRESENTED

1) Does this court have jurisdiction to review this case?

2) Should this case be reviewed pursuant to Supreme Court Rule 17?

3) Is the decision of the California Court of Appeal correct?

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No. 89-566

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

TSAUSHU C. LACKLAND,

Petitioner,

v.

STATE UNEMPLOYMENT APPEALS BOARD,

Respondent.

J.C. PENNY COMPANY,

Real Party In Interest.

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of California Unemployment Insurance Appeals Board, respectfully requests that this Court deny the Petition For Writ of Certiorari seeking review of the decision by the California Court of Appeal

dated March 31, 1989. A petition for rehearing was denied by the California Court of Appeal on April 20, 1989. On June 28, 1989 the California Supreme Court denied the petition for review without comment.

I.

OPINIONS BELOW

The order of the California Supreme Court issued on June 28, 1989 denying the petition for review is unreported and is set forth in the Appendix to Respondent's Brief at p. 1. The Order of the Court of Appeal denying the petition for rehearing is unreported and is set forth in the Appendix to Respondent's Brief at p. 2. The Decision of the Court of Appeal of the State of California is unreported and is set forth in the Appendix to Respondent's Brief at pp. 3-16. The Decision of the Contra Costa County Superior Court is

unreported and is set forth in the Appendix to Respondent's Brief at p. 17.

II.

JURISDICTION

The order of the Supreme Court of the State of California denying the petition for review was filed on June 28, 1989. It is not clear under what authority the petitioner seeks to invoke jurisdiction. As discussed more fully below, it is the respondent's position that there is no jurisdictional basis for review by this Court.

III.

STATUTES AND RULES INVOLVED

28 U.S.C. section 1257:

> "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c.646, 62 Stat. 929."

Rule 17, Supreme Court Rules:

".1 A review on writ of certiorari is not a manner of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

/

"(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a

way in conflict with applicable decisions of this Court."

California Unemployment Insurance Code section 1328:

"The department shall consider the facts submitted by an employer pursuant to Section 1327 and, if benefits are claimed subsequent to the filing of the new or additional claim, make a determination as to the claimant's eligibility for benefits. The department shall promptly notify the claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to Section 1327 or this section and authorized regulations of the determination or reconsidered determination and the reasons therefor. If after notice of a determination or reconsidered determination the employing unit acquires knowledge of facts which may affect the eligibility of the claimant and such facts could not reasonably have been known within the 10-day period provided by Section 1327, the employing unit shall within 10 days of acquiring such knowledge submit such facts to the department, and such 10-day period may be extended for good cause. The claimant and any such employer may

> appeal from a determination or reconsidered determination to an administrative law judge within 20 days from mailing or personal service of notice of the determination or reconsidered determination. The 20-day period may be extended for good cause, which shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect. The director shall be an interested party to any appeal."

III.

STATEMENT OF THE CASE

This case involves the dismissal of the petitioner's appeal from a decision by the California Unemployment Insurance Appeals Board disqualifying her for unemployment benefits. The appeal was dismissed because it was three years late. After the case was dismissed by the trial court, petitioner appealed to the California Court of Appeal. In an unpublished decision the Court of Appeal affirmed the decision of the trial

court on the same grounds. A motion for rehearing was denied. A petition for review to the California Supreme Court was denied *In Bank* without comment. This petition followed. It is the respondent's position that there is no jurisdictional basis for this court to review this case, that review is improper under Rule 17 and that the decision of the California Court of Appeal is correct.

V.

ARGUMENT

1. There Is No Jurisdictional Basis For This Court To Review This Case.

Final judgments of state courts may be reviewed by this court by writ of certiorari where the validity of a federal treaty or statute is questioned, where a state statute is questioned on the ground that it is contrary to the Constitution, treaties, or laws of the United States, or where any right, privilege or immunity is claimed under

federal law or the U.S. Constitution. 28 U.S.C. section 1257(3). None of these grounds is present here. This case involves the denial of unemployment benefits to the petitioner and the dismissal of her appeal therefrom because it was not timely filed. No federal question was raised below, none is raised here, nor were any questions of law ever raised. This case involves the denial of unemployment benefits to the petitioner on a purely factual ground -- her failure to show good cause for her untimely appeal. There is no jurisdiction for this Court to review this case.

2. This Case Is Not Proper For Review Under Supreme Court Rule 17.

Under Rule 17 review on writ of certiorari will be granted only when there are "special and important reasons." Decisions that the court will consider for review include those that present a conflict among courts on a

federal question, or where an important question of federal law is at issue. As discussed *supra*, there are no questions of law, no federal issues and no issues of any significance in this case. One individual, the petitioner, was denied unemployment benefits because her appeal was untimely and she failed to demonstrate good cause for the untimely appeal. This is hardly a case that calls for review under Rule 17.

3. The Decision Of The Court Of Appeal Is Correct.

Under California Unemployment Insurance Code Section 1328 a claimant has 20 days to appeal a denial of unemployment benefits. The petitioner's appeal was filed three years after the appeal was mailed to her.

The holding by the California Court of Appeal that there was substantial evidence for a dismissal of the untimely appeal is fully supported by the record that was

before the Court and relevant case authority. To justify her egregious delay in filing an appeal, the petitioner variously argued that she was misled by the respondent, that she didn't receive notice of the denial and that she didn't understand the appeal process. These arguments have no merit. Although the petitioner testified at the hearing that she "didn't remember" receiving a Notice of Determination in 1982, she readily admitted receiving "another form . . . in the mail that told me I was ineligible" and that she "was told" she was disqualified in 1982. (CT 13, 14.) The Notice of Determination that she didn't "remember" receiving was sent to the address she was living at in 1982 and, according to a Department witness, there was no record of it being returned as undelivered. (CT 15, 16.) On the front of the notice was a clear statement informing the petitioner of the 20-day

appeal period. (CT 8.) The petitioner claimed she wasn't "aware that you could appeal anything that had been ruled by any government office." Nonetheless, she acknowledged receiving a handbook when she applied for benefits that she didn't read. (CT 14.)

Courts have found no good cause for untimely appeals in factual settings far less egregious than this. *Amaro v. Unemployment Insurance App. Bd.* (1977) 65 Cal.App.3d 715; *Martinez v. Unemployment Insurance App. Bd.* (1976) 63 Cal.App.3d 500; *Perez v. Unemployment Insurance App. Bd.* (1970) 4 Cal.App.3d 62. All of the above cases were duly cited by the Court of Appeal. Its decision is entirely in accord with that case law.

CONCLUSION

There is no jurisdictional basis for the court to review this case. Nor are there grounds for review under Rule 17. The decision of the California Court of Appeal is correct and is in accord with the record in this case and applicable case law.

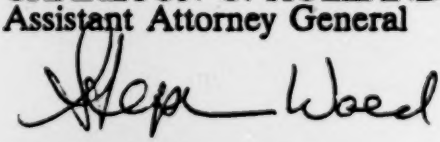
The petition for writ of certiorari should be denied.

DATED: NOVEMBER 16, 1989

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

CHARLTON G. HOLLAND, III
Assistant Attorney General



STEPHANIE WALD
Supervising Deputy Attorney General

Attorneys for Respondent

APPENDICES

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Four, No. A034071
SO10385

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

TSAUSHU C. LACKLAND,

Appellant

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,

Respondent

J.C. PENNY COMPANY,

Real Party In Interest

Appellant's petition for review DENIED.

Filed Supreme Court
June 28, 1989
Robert Wandruff, Clerk

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 4

LACKLAND, TSAUSHU C.
vs.
CALIF. UNEMPLOYMENT INSURANCE BOARD
J.C. PENNY COMPANY
A034071
Contra Costa County No. 275128

FILED
April 20, 1989
Court of Appeal - First App. Dist.
RON D. BARROW, Deputy

BY THE COURT:

The petition for rehearing is denied.

DATED: APRIL 20, 1989

ANDERSON P.J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

TSAUSHU C. LACKLAND,

Petitioner and Appellant,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,

Respondent and Respondent;

J.C. PENNY COMPANY,

Real Party In Interest.

_____/

Facts

Tsaushu C. Lackland (appellant) worked as a temporary employee for real party in interest, J.C. Penny Company in 1982. When she encountered difficulties in arranging for child care, she left this position. At that time the Employment Development Department (Department) denied appellant's claim for benefits on the basis (according to appellant) that she had not earned

enough money to qualify for benefits. The reasons stated for the decision were that the Department considered appellant's quit without good cause, and that it considered her available for work.

The Department mailed a notice of determination/ruling to appellant on March 25, 1982. On the front of the notice, appeared the statement in boldface type: "Any appeal from this notice, to be timely, must be filed in person or by mail on or before 4-14-82." The notice also directed appellant to see the reverse side for "an explanation of the law, appeal rights and certifying requirements." Additionally, the notice explained the reason for the decision denying benefits: "You quit your last employment because of child care problems. The record shows that your obligation to provide child care for your children could have been satisfactorily met without

quitting your employment. It therefore must be held that your quit was without good cause."

Although this notice of determination/ruling clearly informed appellant of her rights and responsibilities regarding an appeal, she did not file her appeal with the California Unemployment Insurance Appeals Board (respondent) until almost three years later, on January 23, 1985. Appellant had also received a handbook when she filed for unemployment insurance in 1982, but neglected to read that booklet until 1985. When the Board denied her appeal as untimely, appellant filed a writ of mandate in superior court, which was also denied, on September 20, 1985. Appellant filed a timely motion for reconsideration of that denial; however, that motion was also denied on January 10, 1986. Appellant appeals the denial of his motion and the reconsideration.

Contentions

Appellant makes several arguments concerning the Department's original denial of her benefits,[1] but those contentions are rendered moot here because of her failure to timely appeal therefrom. The only relevant contention is whether appellant had good cause to delay her appeal for almost three years. She excuses her delay by explaining that statements by the Department that she had not earned enough money to qualify for benefits

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1. Appellant contends that the Department originally misinterpreted her claim, causing it to erroneously deny her benefits. She argues that she did not quit the job, but left temporarily, with an understanding that she would return after straightening out her problems with child care. She also states that the notice of determination/ruling contains conflicts regarding the reasons for decision, and that the Department must demonstrate that appellant received the notice of determination/ruling and that she deliberately delayed in filing an appeal for three years.

Appellant further contends that the lower court erred in its September 20, 1985, ruling denying her writ of mandate because it issued that order without explanation.

misled her in believing that she could not appeal. She also asserts that she did not file another claim for several years because she obtained other employment. Additionally, appellant argues that she failed to timely file her appeal because she relied on information she received from the Department and, therefore, invocation of the doctrine of estoppel is required.

The respondent contends that the record contains substantial evidence upon which to supports its decision dismissing appellant's original appeal as untimely, as well as the finding that appellant failed to show good cause for her untimeliness. We agree.

Discussion

As currently amended, Code of Civil Procedure section 1094.5 provides that standards for review of administrative orders on decisions. It states that unless a

court is authorized by law to exercise its independent judgment on the evidence, "abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." (Code Civ. Proc., § 1094.5, subd. (c).) In James v. Dept. of Motor Vehicles (1968) 267 Cal.App.2d 750, a proceeding wherein the Department appealed the issuance of a writ of mandate setting aside its revocation of respondent's driving privileges, the court explained its application of section 1094.5, subdivision (c). It stated, """when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court

is without power to substitute its deductions for those of the trial court.' . . ."" (Id., at p. 753, emphasis in original.)

According to these standards, the only relevant inquiry before this court is whether substantial evidence supports the trial court's affirmance of the Board's denial of appellant's benefits.

The Department's notice of determination/ruling clearly stated that if appellant chose to file an appeal of denial of benefits, she was required to do so within 20 days. The notice provided that this 20-day period closed on April 14, 1982. The 20-day allowance was as provided by Unemployment Insurance Code section 1328, which states as follows: "The claimant and . . . employer may appeal from a determination . . . to an administrative law judge within 20 days from mailing or personal service of

notice of the determination. . . . The 20-day period may be extended for good cause, which shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect. . . ."

In this case, since appellant missed the 20-day period by approximately 3 years, she must demonstrate good cause for her delay if that delay is to be found excusable. Because she has made no showing of circumstances which approximate good cause, we find the trial court's denial of reconsideration supported by substantial evidence, and affirm.

Courts have evaluated what constitutes good cause in a variety of factual contexts. In circumstances of delays much less egregious than that in this case, the courts have found no good cause for the delays, and have refused to allow appeals in those situations.

In one case where petitioner delayed filing her appeal for approximately one month because of her "dismay occasioned by the denial of benefits," the court found her inadvertent delay inexcusable, and insufficient to constitute good cause. (Amaro v. Unemployment Ins. Appeals Bd. (1977) 65 Cal.App.3d 715.) The court noted that: "On the front of the notice petitioner received, in the lower right corner, was the statement in print, larger than ordinary typewriting, that she had until August 5, 1974, to file a timely appeal." (Id., at p. 718.) Petitioner testified that she did not read the statement about the time limit, because after reading the previous part of the notice denying benefits, she was too upset to read further. (Ibid.) The court held that her one-month delay was substantial, but her stated reason insubstantial, and affirmed the trial court's denial of relief. (Id., at p. 722.)

In Amaro, the petitioner also raised an issue of equitable estoppel, arguing that the Department's denial of her benefits constituted an incorrect decision, requiring that her late appeal be allowed. (Amaro, supra, 65 Cal.App.3d at p. 720.) She argued that the Department misled her regarding the legality of her claim, and that her ignorance of its correct legal interpretation caused her to rely upon the Department's assertions. (Id., at p. 721.) Citing legislative intent regarding the "good cause" requirements, the court declined to apply the doctrine of equitable estoppel in this case. (Id., at pp. 721-722.)

In another case, where petitioner appealed 20 days late because his family was ill and because he was occupied with looking for a new house, the court found no good cause for his delay. (Martinez v. Unemployment Ins. Appeals Bd. (1976) 63 Cal.App.3d 500.) Like the

Amaro court, this court noted that on the front page of the notification form received by petitioner, the statement appeared in boldface type: **"ANY APPEAL FROM THIS NOTICE MUST BE FILED ON OR BEFORE DECEMBER 20, 1974 TO BE TIMELY."** (Id., at p. 502, fn. omitted.) Petitioner filed his appeal on January 9, 1975. (Ibid.) In finding that the trial court's denial of petitioner's appeal was supported by substantial evidence, the court distinguished these facts from cases showing good cause. It cited two cases in each of which overburdened counsel had made calendaring errors causing them to file appeals three days after the deadline. (Id., at p. 504.) The court explained that this was the sort of error intended to be excused, in view of the "remedial objectives and informal procedures of the Unemployment Insurance Code. . . ." (Ibid.) However, it characterized

this case as "quite different," because "the claimant caused the delay himself." (Id., at p. 505.) That court also declined to accept appellant's argument in favor of applying equitable estoppel. (Ibid.)

In a third case, the court affirmed a finding of no good cause for petitioner's delay of five months in filing his appeal, where petitioner argued that he was misled by the Department's notices and thereby induced not to appeal. (Perez v. Unemployment Ins. App. Bd. (1970) 4 Cal.App.3d 62.) Like the two courts discussed above, this one also pointed out that on the front of the notice of determination received by appellant appeared a statement in heavy print informing appellant of the imminent deadline to file his appeal. (Id., at p. 64.) In Perez, petitioner contends that he did not think he should have appealed at the time when he received that notice, but

changed his mind five months later. (Id., at p. 65.) The court explained that both the administrative tribunal and the trial court found on the facts that petitioner failed to demonstrate good cause for his delinquent appeal. (Ibid.) It stated that "[t]o the extent that the issue is factual, or subject to the discretion of the trier of facts, it has been resolved against petitioner. . . ." (Ibid.) The court refused to find that as a matter of law, petitioner's good faith beliefs regarding the propriety of his appeal constituted good cause for his delay.

In the present case, appellant received a notice of determination/ruling from the Department on or about March 25, 1982. Appellant did not file an appeal until January 23, 1985, almost three years later. On the front of her notice, like those in the above-mentioned cases, was a statement in bold type, clearly informing appellant

of the 20-day period in which she could file a timely appeal. To justify her extreme delay, appellant attests only to her lack of understanding of the appeals process, and to alleged errors made by the Department in denying her benefits. Appellant offers no justification for her failure to read the explanatory handbook which she received along with her denial. In light of the relevant case law, and the explicit rule requiring a showing of good cause for extending the 20-day statutory period for filing an appeal, the trial court's finding of no good cause for delay is clearly supported by substantial evidence.

The judgment is affirmed.

In The Superior Court Of The State Of
California
IN AND FOR THE COUNTY OF CONTRA COSTA

TSAUSHU C. LACKLAND,

Dept. 9, No. 275128

Petitioner **NOTICE OF DECISION**

vs

STATE UNEMPLOYMENT INSURANCE
APPEALS BOARD,

Respondent

THE PETITION BY TSAUSHU C. LACKLAND FOR WRIT OF MANDATE was heretofore submitted to the Court for decision. The Court, having fully considered the same and being duly advised, now orders said petition denied.

FILED SEPTEMBER 20, 1985

J.R. Olsson, County Clerk

/s/
J. Barlettani

PROOF OF SERVICE BY MAIL

I hereby certify that I am a citizen of the United States, over the age of 18 years and not a party to the within action. I served a true copy of the foregoing document by placing the same in an envelope which was sealed, fully provided with postage thereon and deposited in the United States Mail at Martinez, California on Sept. 20, 1985.

Said envelope was addressed to

WILLIE M.J. CURTIS, Esq.
Deputy Attorney General
6000 State Building
San Francisco, CA 94102

TSAUSHU C. LACKLAND
110 Bailey Rd., Apt. #208
W. Pittsburg, CA 94565

I certify under penalty of perjury that the foregoing is true and correct.

Dated at Martinez, California, on Sept. 20, 1985.

/s/
J. Barlettani

CERTIFICATE OF SERVICE BY MAIL

TSAUSHU C. LACKLAND,

Petitioner,

v.

STATE UNEMPLOYMENT APPEALS BOARD,

Respondent.

J.C. PENNY COMPANY,

Real Party In Interest.

NO. 89-566

STEPHANIE WALD, a member of the Bar of the Supreme Court of the United States, states:

That her business address is 350 McAllister Street, Room 6000, in the City and County of San Francisco, State of California; that on November 16, 1989, she served true copies of the attached **Respondent's Brief In Opposition** and **Appendices** in the above-entitled matter on petitioner and real party in interest by placing same in envelopes addressed as follows:

Tsaushu C. Lackland
1743 Hanlon Way
Pittsburg, CA 94565

John H. Andrew
Western Regional Counsel
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California Court of Appeals
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California Supreme Court
350 McAllister Street, Fourth Floor
San Francisco, CA 94102

Contra Costa Superior Court
Attn: Ellen James, Judge
P.O. Box 911
Martinez, CA 94553

Said envelopes were then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

Stephanie Wald

STEPHANIE WALD
Supervising Deputy Attorney

JOAN CHICCARELLA
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN FRANCISCO
My Commission Expires June 26 1992

Subscribed and sworn to before me this
16th day of November, 1989.

Joan Chiccarella

Notary Public in and for said County
and State

Supreme Court, U.S.
FILED
DEC 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-444, 89-566, and 89-853

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

DEPARTMENT OF TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that federal agencies need not provide the home addresses of employees to their collective bargaining agent because such disclosure intrudes on employees' interest in privacy and does not significantly advance the purposes of the Freedom of Information Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-444

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION

No. 89-566

NATIONAL TREASURY EMPLOYEES UNION, PETITIONER

v.

DEPARTMENT OF TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.

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FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF TREASURY, FINANCIAL MANAGEMENT SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a)[1] is reported at 884 F.2d 1446. The four opinions of the

[1] All Pet. App. references are to the appendix in No. 89-853.

Federal Labor Relations Authority (Pet. App. 38a-91a) are reported at 25 F.L.R.A. 828, 25 F.L.R.A. 560, 24 F.L.R.A. 917, and 24 F.L.R.A. 209.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1989. The petitions for a writ of certiorari were filed on September 14, 1989, October 31, 1989, and November 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Resolution of the question presented—whether federal agencies are required to provide the home addresses of employees in a bargaining unit to the union that represents the unit—requires consideration of three federal statutes. Title VII of the Civil Service Reform Act of 1978 (CSRA), also known as the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*, governs collective bargaining in the federal sector. The statute generally provides that a federal agency must provide information that is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" to the authorized representative of its employees. 5 U.S.C. 7114(b)(4). However, Section 7114(b)(4) requires disclosure only "to the extent not prohibited by law." The Privacy Act of 1974, 5 U.S.C. 552a, is therefore relevant to a request for employees' home addresses, because one of its provisions (5 U.S.C. 552a(b)) "generally prohibits disclosure of personnel information." Pet. App. 10a. There is an exception to the Privacy Act (5 U.S.C. 552a(b)(2)) for information that must be disclosed under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and therefore FOIA is also per-

tinent to the question presented. While generally requiring disclosure of information in agency files, FOIA excepts from disclosure information in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Application of the exception in Section 552(b)(6) "requires a balancing of the harm to the individual whose privacy is breached against the public interest served by disclosure." Pet. App. 10a.

The Federal Labor Relations Authority (FLRA) first considered whether federal agencies must disclose home addresses to unions in *Farmers Home Administration Finance Office,* 19 F.L.R.A. 195 (1985). It held that "the employees' strong privacy interest in their home addresses" outweighed the public interest in disclosure since the union had adequate alternative methods of communicating with members of the bargaining unit. *Id.* at 198. The Second Circuit disagreed with that determination. *AFGE, Local 1760* v. *FLRA,* 786 F.2d 554 (1986). The FLRA then changed its position. It concluded that the "public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interests of individual employees in their names and home addresses." *Farmers Home Administration Finance Office,* 23 F.L.R.A. 788, 793 (1986).

Three courts of appeals upheld the Authority's revised conclusion and enforced orders requiring federal agencies to disclose the names and addresses of employees. *United States Department of Navy* v. *FLRA,* 840 F.2d 1131 (3d Cir.), cert. dismissed, 109 S. Ct. 632 (1988); *United States Department of the Air Force* v. *FLRA,* 838 F.2d 229 (7th Cir.), cert. dismissed, 109 S. Ct. 632 (1988); and *United States Department of Health and Human Services* v. *FLRA,* 833 F.2d 1129 (4th Cir. 1987), cert. dismissed,

109 S. Ct. 632 (1988). The Eighth Circuit rejected the FLRA's position in part, holding that at least some employees have a sufficient privacy interest in their home addresses such that release would constitute a clearly unwarranted invasion of personal privacy. *United States Department of Agriculture* v. *FLRA*, 836 F.2d 1139 (1988), vacated on other grounds and remanded, 109 S. Ct. 831 (1989).

2. The decision of the court of appeals in this case arose out of four cases decided by the FLRA. In three of the cases, a union filed an unfair labor practice charge after a federal agency refused to provide the home addresses of employees in a bargaining unit the union represented. The fourth case arose after a union proposed that the agency agree to provide addresses and the agency refused to negotiate over the proposal. In each of the four cases the FLRA concluded, without deciding whether the union had adequate alternative means of communicating with members of the bargaining unit, that the agency was required to disclose the addresses. Pet. App. 38a-91a.

The court of appeals reversed. Pet. App. 1a-36a. In balancing the privacy interest of the employees against the public interest in disclosure, the court first noted that "entrepreneurs have filed FOIA requests for specific names of classes of current government employees in order to aid them in business solicitation." Pet. App. 13a. It concluded that federal employees have a privacy interest in avoiding an " 'unwanted barrage of mailings and personal solicitations' " from such persons. *Ibid.* (quoting *National Association of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 876 (D.C. Cir. 1989), and *Minnis* v. *United States Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985)).

The court of appeals further concluded that any interest in disclosure was minimal because the purposes of FOIA—

which "focuses on the citizens' right to be informed about 'what their government is up to' " (*United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468, 1481 (1989))—would not be advanced appreciably by disclosing the home addresses of bargaining unit members. While the court hypothesized that an investigative reporter might use the home addresses of government employees "to ferret out what 'government is up to,' " it concluded that any public interest in the disclosure of employees' addresses was not "enough to outweigh the workers' significant interest in privacy." Pet. App. 13a, 14a.

In reaching its conclusion, the court below noted that each of the contrary decisions of the courts of appeals did not have the benefit of this Court's decision in *Reporters Committee* and "considered the *special* public interest in advancing collective bargaining as an aspect of the disclosure value, and, indeed, as the clinching value." Pet. App. 11a. That approach was erroneous in light of *Reporters Committee*, the court below stated, because in that case "the Court made clear that under FOIA the disclosure interest must be measured in terms of its relation to FOIA's central purpose—'to ensure that the *Government*'s activities be opened to [the] sharp eye of public scrutiny.' " Pet. App. 11a (quoting 109 S. Ct. at 1482).[2]

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[2] The court of appeals also held that the "routine use" exception to the Privacy Act (5 U.S.C. 552a(b)(3)) does not authorize disclosure. Under that exception—which authorizes the routine disclosure of information in personnel files where an agency has filed a notice in the Federal Register describing the sorts of routine disclosures that will be made (5 U.S.C. 552a(e)(4)(D))—the Office of Personnel Management (OPM) has concluded that agencies may disclose the addresses of bargaining unit members to unions, but only if the union shows that no adequate alternative means exist for contacting the employees. Pet. App. 18a-19a. The unions here had made no such showing. *Id.* at 22a.

gaining may not be taken into account in determining whether addresses should be released to federal sector unions. As she correctly explained in her concurring opinion, "[t]he broad cross-reference in 5 U.S.C. 7114(b)(4)—'to the extent not prohibited by law'—picks up the Privacy Act unmodified; that Act, in turn, shelters personal records absent the consent of the person to whom the record pertains, unless disclosure would be required under the Freedom of Information Act * * *. Once placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public." Pet. App. 24a.[4]

Moreover, even if the union's special interest in obtaining employees' addresses could properly be considered, that interest is hardly weighty. Under OPM's "routine use" regulation (see note 2, *supra*), a union may obtain home addresses where there is no adequate alternative method for it to contact employees. Thus, the special interest that would be relevant here is whatever interest a union with other adequate means of contacting employees has in obtaining their home addresses.[5] And if special interests are

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[4] Judge Ginsburg complained (Pet. 26a-27a) that private sector unions are able to obtain addresses from employers. But public employees are treated differently than private employees in many respects. For example, they are not allowed to strike (5 U.S.C. 7116(b)(7)) and most cannot bargain about wages, which are set by Congress (see 5 U.S.C. 7102(2), 7103(14)). Public employees also enjoy protections—notably those provided by the Bill of Rights—that do not restrict private sector employers. Among those protections is coverage under the Privacy Act, which applies only to public agencies and generally prohibits the distribution of personnel information.

[5] The records before the FLRA showed that the unions had adequate alternative means of contacting employees. In the case of the Social Security Administration, for example, the Union was permitted to use specified bulletin boards; to distribute literature "desk-to-desk";

to be considered, it should be recognized that a union with adequate means of contacting employees will fail to have the home addresses only of those employees who refuse to provide them to the union, presumably because they do not wish to be contacted by the union at home. The claims of those employees to the enjoyment of home and hearth undisturbed by unwanted union intrusions—the right to be left alone, at home if nowhere else—should be honored.[6]

2. Contrary to petitioners' contentions (89-853 Pet. 15-19; 89-566 Pet. 11-14; 89-444 Pet. 6), there is no conflict in the circuits that warrants consideration by this Court. Each of the allegedly contradictory court of appeals decisions predates this Court's decision in *Reporters Committee.* This Court's decision in that case made clear that, where an exception to FOIA's general rule that agency records must be disclosed is applicable, the factors weighing against disclosure must be balanced against the central purpose of FOIA, which is ensuring that "the *Government*'s activities be opened to the sharp eye of

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to hold meetings on off-duty time; to distribute its newsletter four times a year; to use the agency's internal mail system; to use the agency's telephone system; and to be present at new employee orientations. C.A. App. 118; see also Pet. App. 45a-46a, 71a-72a.

[6] Contrary to Judge Ginsburg's suggestion (Pet. App. 28a-29a), neither the Court's decision in *Reporters Committee* nor its application to this case is contrary to the Court's decision in *United States Department of Justice* v. *Tax Analysts,* 109 S. Ct. 2841 (1989). The Court held in *Tax Analysts* that documents in the control of an agency, such as the judicial decisions at issue in that case, are "agency records" under FOIA. Accordingly, an agency may withhold such documents "only if it proves that the documents fall within one of the nine disclosure exceptions set forth in 552(b)." 109 S. Ct. at 2845. In *Tax Analysts* no exception applied. Here, in contrast, the exception for personnel files "the disclosure of which would constitute a clearly

public scrutiny." 109 S. Ct. at 1482. The other courts of appeals should be given an opportunity to reconsider their prior decisions in light of *Reporters Committee.*[7]

Moreover, the FLRA itself should reconsider its prior decisions in light of *Reporters Committee* before this Court considers the matter. Its decisions in this case were all handed down prior to *Reporters Committee.* Thus far, the FLRA has issued no decision explaining how its position is sustainable if the special interest in collective bargaining is not included on the side of the scale favoring disclosure. On reconsideration, it may well change its position again and agree with the court below. In that event, the unions can challenge the decision in the various courts of appeals and attempt to create a conflict in the circuits. If a conflict emerges, review may be warranted, but it is not warranted now.[8]

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unwarranted invasion of personal privacy" *does* apply. The applicability of an exception cancels the statutory mandate of disclosure of agency records and requires consideration of whether disclosure would promote the purposes of FOIA.

[7] The FLRA notes (Pet. 16 n.12) that the Seventh Circuit in the *Air Force* case did not rely on the union's collective bargaining interest, but held that employees' home addresses are generally available under FOIA. That conclusion cannot endure after *Reporters Committee,* since the Seventh Circuit identified no purpose relating to "what the[ ] government is up to" (109 S. Ct. at 1481) that would be furthered by the disclosure of employees' addresses. It simply concluded that "[t]here are legitimate uses for home addresses; the Union proposes one such use." 838 F.2d at 233.

[8] The FLRA suggests (Pet. 17) that a conflict cannot emerge if it does not change its position because federal agencies may challenge any of its decisions in the District of Columbia Circuit under 5 U.S.C. 7123(a). However, the FLRA is authorized by 5 U.S.C. 7123(b) to enforce its orders in any appropriate court of appeals, which would include courts other than the D.C. Circuit in cases arising outside the District. We are aware of no authority preventing it from filing an enforcement action in another court of appeals as soon as it hands down an order.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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*Acting Solicitor General**
STUART M. GERSON
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LEONARD SCHAITMAN
SANDRA WIEN SIMON
Attorneys

DECEMBER 1989

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* The Solicitor General is disqualified in this case.

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